# MUSLIM PERSONAL LAW

PAPERS AND PROCEEDINGS
OF
A SEMINAR

*Edited by*
Dr. F.R. Faridi
Dr. M.N. Siddiqi

# Publisher's note

The Muslim Personal Law is a very sensitive issue. It is at stake since a long time. With the advent of foreign powers, in particular the Britishers, colonial in nature, the Muslim rule came to an end. With this the Shariah Law also gone away which was the guiding principle for the state. The new British colonial power introduced its own state law in place of it. It formulated separate civil laws for different religious identities of its dominion. Thus Muslim Personal Law cane into being, though in real terms it was a restricted form of Shariat law in the sense that it covered only a few aspects nevertheless very important. Some people considered it as divisive set of lows. On this ground they oppose it ever today. Since then this debate is going on, it is a living problem and the subject is still relevant.

# INTRODUCING THE SEMINAR

For some time past the question of drastic amendments in the Muslim Personal Law has been debated in the Parliament, some of the state Legislatures and the press. The main provocation has been provided by the alleged intention of the powers that be to illegalize polygamous marriages. The constitutional provision in the form of Article 44, enjoining upon the State to strive towards a uniform civil code throughout the territory of India has provided further impetus to the controversy. The protagonists of change, as also a section of 'modernist' Muslim elite have sought to strengthen their case by citing the example of some Muslim countries which have allegedly abolished some of the *Shariah* laws or have introduced drastic changes in these laws. The Muslim masses have always reacted sharply to these suggestions and all the *Ulema*, irrespective of their sectional persuasions, have stoutly rejected such proposals as being against Islam. Muslim political leadership has also rallied round these sentiments, making a united front against pro-changers on the ground that it would amount to interference in the religious affairs of the Muslim community, thus encroaching upon the religious and cultural freedom guaranteed by the Constitution. Time and again the Union Government has, in view of this universal opposition, shelved the various measures under its consideration, and has almost accepted the principle that proposals for reform in the Muslim Personal Law should originate from within the Muslim community itself. This implies that the prochangers must sell their ideas to the community, its leaders and *Ulema* and convince them of the desirability of the changes envisaged.

This is how the matters stand. But there are some disquieting features of the situation which one meets as studies it and tries to probe deeper.

The most disturbing, rather disappointing feature of the above mentioned debate on this issue is that it is mostly political and sentimental, ill-informed and hardly conducive to make either parties understand one another's mind. As a matter of fact there has been no real debate at all. The prochangers express their views in the English Press, their opponents reply in the Urdu Press. The prochangers refer to the wind of change, to the spirit of modernity and to the constitutional provision relating to a uniform civil code; while their opponents quoted the Quran and sunnah, emphasise the religious and cultural rights of the minority, and the long history of the existing laws. Specific proposals for change are rarely debated. Bad sociology, factitious statistics and hearsay accounts of what has been happening in the Muslim countries are glibly swallowed by the limited readership of a few modernists while the masses and the *Ulema* are generally satisfied by cursory argument supported by supposedly awe-inspiring authority, which in reality serves only their own self-complacency. Islamic injunctions such as the permission to polygamous marriages or the rules relating to divorce or Inheritance are seldom explained to the citizens of modern India in terms understandable to them. No scholarly study has been made in this country regarding what has really happened the Muslim countries and to what extent the reforms introduced there have been endorsed by the people and the scholars in those countries. Champions of democracy shamelessly cite law imposed by Military Dictators and there is no one to give them a lie as to the background and evolution of these imposed changes. No comparative study of the Islamic provisions relating to Marriage, Divorce, Inheritance, etc., and their 'modern' alternatives has been made so that an unbiased citizen could formulate his own views in well informed manner.

In principle the *Ulema* have always accepted the need of *Ijtihad*, of frequently reviewing the details of the law in the light of changed circumstances and accumulated experience. But no serious attempt has been made to subject the existing Mohammadan Laws to this process. In our view this is the most unfortunate aspect of this situation, being to some extent responsible for creating the present crisis. The political leadership of the community is justifiably fighting for the principle that the right to reform its Personal Law belongs to the Community itself as the interests of the others are not involved. But the same leadership has done little to think over, much less to devise and expedite, the process through which the Community shall formulate its opinion, express them, and exercise the right being fought for.

It goes without saying that the question of Personal Laws is one of the most important problems that the Muslims of India face today. On its solution depends, to a great extent the nature and extent of their *Islamic* life in this country. If the disquieting features noted above stir the conscience of some of our readers we earnestly hope that they will rise to action, instead of succumbing to despair or indulging in the wishful thinking that political agitation will always do the trick. There is an urgent need of serious thinking, study, debate and presentation of considered views on the subject before the elite in the country. We do not and cannot live in isolation. We have to carry along the right minded people of the majority community if we want to secure a just solution of this problem. A necessary precondition to that is, however, that we set our own house in order and evolve, through thoughtful deliberations and well informed debates, agreed views on the relevant issues within the community. An all out effort must be made to argue our case convincingly in order to persuade the skeptics to see reason in what we believe to be the Islamic position on the relevant issues.

This is not to deny or belittle the need of political efforts to stop the Government from succumbing to the pressure of the

strong communal lobby supported by pseudo-secularists who one fears, might never be convinced. But political efforts cannot long succeed if they are not backed by reason and strengthened by the support of such sections of the majority community as are willing to see that justice is done to the minority.

It is with these facts in view that the Islamic Research Circle, Aligarh, conceived the idea of initiating a discussion on the Muslim Personal Law. Being a non-political academic body with very limited resources it could not be very ambitious in this regard. A modest beginning was made in 1967 by organizing a Symposium at Aligarh in which a number of the Faculty members from the University participated. Encouraged by the interest taken in this venture it issued an invitation to a number of *Ulema*, jurists and social scientists to participate in a Seminar on Muslim Personal Law at Aligarh. Thank God the Seminar was held in the middle of September 1968. The proceedings of this Seminar are now being made available to the general public with a view to promoting serious thinking on this issue.

The sponsors had requested the participants to discuss the following topics along with the other relevant aspects of the problem:

(i) Historical and Cultural Perspective of recent changes in Muslim personal Law in Muslim countries.

(ii) Evaluation of recent changes in Muslim Personal Law in Muslim countries.

(iii) The desirability and scope of changes in Muslim Personal Law in India.

(iv) The mechanism of changes in Muslim Personal Law in India.

The learned writers naturally dealt with many other topics in their papers, but the discerning reader will find considered views on the above topics in what follows.

With these introductory remarks the Proceedings of the seminar of Muslim Personal Law are presented to the public, especially to the elected representatives of the People, and to the Press which shoulders the grave responsibility of moulding public opinion. We commend this volume to the Muslims, their *Ulema*, leaders and jurists. Being the first discussion of its kind, it naturally has a tenor which makes it more suitable for the community's internal consumption rather than convincing the outsiders. The more the Muslims themselves discuss the issue, thrashing out their differences and converging on agreed formulations the more such discussions will be useful considering the imperatives of life in a plural society and providing food for thought to the non-Muslim observer. We earnestly look forward to that stage, meanwhile praying to Allah to accept the humble effort and make it successful by opening up the minds of man for His Guidance.

**M. N. Siddiqi**

# CONTENTS

**Muslim Personal Law:** *Nature and Significance*

1. Real Nature of The Muslim Personal Law
   *Maulana Sadruddin Islahi*
2. Can the Shariah- Laws be Modified?
   *Maulana Syed Ali Nqi*
3. Muslim Personal Law
   *Maulana Mohammad Ishaq Sandelvi*
4. Polygamy
   *Maulan Syed Ahmed Qadri*
5. Polygamy in Islam
   *Mohammad Mustafa Ali Khan*
6. Personal Law Problems
   *S. A. Shafi, P. C. S.*

**Muslim Personal Law:** *Indian Context*

7. Muslim Personal Law in India
   *Maulana Minatullah Rahmani*
8. Changes in Muslim Personal Law: Scope and Procedure
   *Maulana Syed Hamid Ali*
9. Can we Abolish Muslim Personal Law?
   *Syed Asim Ali Subzwari*
10. The Mechanism of Changes in Muslim Law
    *Mr. M. R. M. Abdul Karim*

11. The Uniform Civil Code

*Mr. Mohammad Ghouse*

12. Muslim Personal Law

*Mr. Zafar Ahmed Siddiqui*

**Muslim Personal Law:** *The International Perspective*

13. Contemporary Trends in Muslim Personal law

*Mr. Fazlur Rahman*

14. A Comparative Study of Recent Changes in Muslim Personal Law in Muslim Countries

*Mrs. N.A. Haider*

15. Precedents for Law Reform in Islamic History Relevance for India

*Tahir Mahmood*

**DISSCUSSION**

16. Programme of the Seminar on the Muslim Personal Law

17. Summary of Disscussion

**PRESIDENTIAL ADDRESSES**

18. The Aim and Objects of the Seminar on Muslim Personal Law

*F. R. Faridi*

19. Presidential Addresses

**ISLAMIC RESEARCH CIRCLE**

20. Islamic Research C'.cle

21. Islamic Thought

# List of participants in the Seminar on Muslim Personal Law

1. Maulana Mufti Ateequr Rahman Usmani
   *President, Nudvatul Musannifeen, Delhi.*
2. Maulana Minnatullah Rahmani
   *Amir Shariat, Bihar*
3. Maulana Saeed Ahmad Akbarabadi
   *Professor of Theology, A. M. U. Aligarh.*
4. Maulana Syed Ali Naqi
   *Formerly Professor of Theology, A. M. U. Aligarh.*
5. Maulana Mohammad Ishaq Sandelvi
   *Formerly Sheikh al Hadith, Nadvatul Ulema, Lucknow.*
6. Maulana Sadruddin Islahi
   *Director, Islamic Research Circle.*
7. Maulana Syed Hamid Ali
   *President, Idara Shahadat-e-Haq, Delhi.*
8. Maulana Syed Ahmad Urooj Qadri,
   *Editor 'Zindagi', Rampur.*
9. Mr. Nooruddin Ahmad
   *Bar-at-Law Delhi*
10. Prof. Hafeezur Rahman
    *Formerly Dean Faculty of Law, A. M. U. Aligarh.*
11. Mr. N. M. A. Karim[1]

[1] The scholars could not attend the Seminar in person though their papers were received and are included in this volume.

*Advocate, Supreme Court.*

12. Mr. Syed Azeezushafi
    *P. C. S., S. Judge, 1st Class, Delhi*
13. Mr. Syed Asim Ali Sabzwari *
    *Advocate, Meerut.*
14. Mr. Zafar Ahmad*
    *Advocate, Sitapur.*
15. Mr. Tahir Mahomood
    *LL. M., Delhi.*
16. Mr. Md. Ghaus
    *LL. M., Faculty of Law, A. M. U. Aligarh.*
17. Mustafa Ali Khan
    *Faculty of Law, Aligarh.*
18. Mr. Mohammad Fazlur Rahman
    *M. A., M. Th., LL. B. Faculty of Theology, A.M.U, Aligarh*
19. Mr. Anwar Ali Khan Soze
    *Department of English Jamia Millia Islamia, Delhi*
20. Mrs. Nayyer A. Haider*
    *MA., LL. M. Lecturer, Govt. Art & Commerce College Indore.*

Besides the above mentioned participants who presented papers in various session of the Seminar, members of various Faculties of the Aligarh Muslim University and a large number of students also attended the Seminar, and took part in the discussions on the papers read at the Seminar.

# MUSLIM PERSONAL LAW:
## NATURE AND SIGNIFICANCE

# REAL NATURE OF THE MUSLIM PERSONAL LAW

Maulana Sadruddin Islahi

*Director, Islamic Research Circle*

The problem of Muslim Personal Law is presently engaging the attention of the Muslim community as well as the country in general. That seems quite natural, as it relates to the social, cultural, moral and religious interests of millions of our people. It is not an academic issue but a practical problem whose solution, and the way the solution is found, are sure to have far reaching consequences for the religious and cultural life of the Muslims of India. The gravity of the issue demands that we steer clear of conservatism and narrow-mindedness and also of blind imitation and unprincipled adjustment with the mood of the times. Any deviation from the correct approach will distort our views on the issue and do irreparable harm. An attempt is made in what follows to give a cool, just and balanced analysis of the problem. I shall confine, though to a fundamental question of decisive importance: what is the real nature of the Muslim Personal Laws? Why is the body of laws under discussion called Muslim Personal Law? Is it because of their having evolved from the custom and traditions of the Muslim people over their long past and their having been adopted by the Muslim community to suit its convenience in social and cultural affairs? Or is it rooted much deeper into that faith and conduct of life allegiance to which makes one a Muslim? Aren't these laws an inalienable part of the Islamic injunctions to which a Muslim must adhere steadfastly lest he ceases to be a Muslim? Should this be the real position our

approach to Muslim Personal Laws will be entirely different from that resulting from the position mentioned earlier. The two approaches are entirely different in their logical implications.

Consulting the basic sources of Islam-the book of Allah and the Sunnah of the Prophet-we come across four facts relevant to the issue at hand.

1. The Quran and the Sunnah do deal with personal affairs. There are hardly any matters coming within the scope of Muslim personal laws on which these sources do not give specific rulings. They contain specific laws relating to Marriage, *Mehr, Divorce, Khula, Ila, Iddah, Zihar, Kazaah, Inheritance, Will* and *Wakf.*

   This is too well known a fact to require documentation before a well informed audience.

2. These laws are intrinsically related to the basic values and ideals of our religion. They do not just happen to be there in the sources of Islam; they are there by virtue of their being essential manifestation of the spirit of Islam and necessary corollaries to its ethical approach to living. An example will clarify this point. In Islam the supreme value attaches to a person's faith and its preservation ranks highest in the objectives of Islamic Law. The prohibition of marital relations between Muslims and non-Muslims inevitably follows from this basic value.

This is why the lines of Quran asking Muslims not to marry non-Muslims are followed by the significant statement: 'These invite unto the Fire, and Allah inviteth unto the Garden, and unto forgiveness by His grace'. (II:221)

The meaning of this statement is clear. The powerful emotional ties built by companionship in marriage expose the Muslim partner to the danger of being influenced by the un-

Islamic beliefs and practices of his or her non-Muslim partner. The offspring of such couples are more strongly exposed to this danger which might ultimately lead to their being condemned in the life hereafter. A Muslim must not, therefore, invite disaster by exposing himself to this danger in choosing his or her spouse.

Take another example. Chastity is the essence of humanity, an exalted ethical value. Corruption of this value would be disastrous for the Islamic way of life. This is the context in which rules relating to *purdah* have been laid down. Preservation of this value is also the object of making marriage obligatory. Says the Prophet:

> 'O Youngmen! Whosoever can afford to marry should do so as it maintains piety in sex and saves the eyes from distraction'.

The Quran refers to the same value while allowing marriage with slave girls:

> 'This is for him among you who feareth to commit sin'.
>
> (IV: 26)

With the same end in view the Muslim society has been asked to see to it that widows and widowers and the marriageable slaves are settled in marriage:

> 'And marry such of you as are solitary and the pious of your slaves and maid servants'.
>
> (XXIV: 32)

The moral and social grounds for allowing polygamy also include, at least in some cases, this objective of maintaining a standard of chastity. The chief objective of this institution is, however, the realisation of another basic Islamic value, that is the protection of the rights of the weaker sections of society, especially the orphans, and furtherance of their good. The line of the Quran containting this permission reads:

> 'And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice'. (IV :3)

Though other texts in the Quran and Sunnah clarify that permission to polygamy is not bound with the condition that it should be exclusively with a view to protecting the rights of the orphans, this nevertheless clearly stands out as the chief objective of this permission in the light of the above line. In order to ensure a just and benign treatment to the orphans the Quran, in the above line, suggests that people should marry these orphans' widowed mothers. This is likely to invoke love towards these orphans and lay a secure emotional base for a sympathetic and affectionate attitude towards them.

3. The third outstanding feature of these laws as found in the Quran and Sunnah is that they are not only stated therein but also emphasized as being duties God has enjoined on His subjects. They are there as His Commands; as boundaries set for freedom of action. Man must respect these boundaries and bow to these Commands.

Thus the rules relating to marriage are followed by phrases such as:

> 'It is a decree of Allah for you'. (IV : 24)
>
> 'That is the judgment of Allah. He judgeth between you.' (LX :10)

Rules regarding divorce, by the husband or one obtained on the wife's initiative; are followed by the warning:

'These are the limits (imposed by) Allah. Transgress them not: (II: 229)

The laws relating to the wife of a deceased husband observing certain restraints are followed by the reminder that:

> 'That is the Commandment of Allah which He revealeth unto you? (LXV: 5)

At yet another place such rules have been described as 'limits imposed by Allah'. (LXV: 2) The law of inheritance in the Quran (IV: 7-14) touch upon four different aspects of the nature and importance of these rules. First of all it has been emphasized that the heirs are to share the legacy and these shares are defined by God Himself. The details of the law are prefaced by the phrase 'Allah chargeth you' to impress upon the reader that these laws are God-given; hence they are to be observed scrupulously. As the statement of the details proceeds on it is interrupted to declare that 'It is an Injunction from Allah'. Lastly, they are concluded on the reminder that 'these are the limits (imposed by) Allah'. One cannot but be deeply impressed by the care taken by the Quran to impress upon its readers the nature of these laws and the fact that they are obligatory.

4. This leads us to the fourth and the last fact relating to these laws, namely observance being a necessary corollary to one's faith, an inalienable part of a God-fearing pious conduct of life. By their very nature, their contravention amounts to transgression, sin and apostasy. This point is fully borne out by the relevant texts of the Quran and Sunnah. Referring once again to the law of inheritance we find the following statement as they are concluded on the reminder that 'these are the limits (imposed by) Allah:

   > 'And whose disobeyeth Allah and His messenger and transgresseth His limits, He will make him enter Fire, where such will dwell forever; this will be a shameful doom'. (IV: 14)

In the same manner divorce rules are followed by the remark:

> 'This is an admonition for him among you who believeth in Allah and the Last Day. That is more virtuous for you, and cleaner'. (II: 232)

And Laws relating to Zihar are concluded on the statement:

> 'This that ye may put trust in Allah and His messenger. Such are the limits (imposed by Allah); and for disbelievers is a painful doom'. (LVIII: 4)

These four features of Islam's Family Laws are closely interrelated. As a matter of fact it is inconceivable that any one of these features could stand without the other three accompanying it in the Quran and Sunnah. The real nature of Muslim Personal Laws is fully borne out by the four facts stated above. They are sufficient to convince a thoughtful reader that these laws are in fact part of religion; that they form an essential chapter in the Quran and Sunnah which can neither be torn away nor forgotten. What would remain of Islam and what meaning would attach to religion if one were to deny this real nature of these laws? How could one deny their being part of religion when they are explicitly stated in the Quran and explained by the Prophet? What would be the meaning attaching to such statements as 'Commandment from Allah', 'Decree of Allah' and 'Limits imposed by Allah' if one were to deny these laws being essential part of Islam? Would not the very belief in the Quran and Sunnah being the final authority lose all substance?

The above raises the fundamental question as to who is entitle to judge what falls within the scope of a particular religion and what does not. Is it not that religion itself, its source book and the sayings of its Prophet are the final arbiter in this regard? If Knowledge and Justice, Right and Reason answer in the affirmative one should not hesitate in accepting the fact that Muslim Personal Laws are an essential part of Islam.

Let us now examine the opposite viewpoint and see on what ground they deny this status to these laws and therefore consider them to be changeable. As far as I know they do so on the basis of three "arguments":

1. Their first argument lies in their assertion that affairs such as marriage, divorce, inheritance and will are purely mundane affairs unrelated to worship and the religious life. They belong to the social, cultural and economic spheres of life. By their very nature they can have nothing to do with religion whose essence lies in man's relation with God, His remembrance and worship, and in spiritual efforts directed towards reaching Him. Religion belongs to the places of worship and the solitudes of contemplation, not to the heat and din of worldly affairs. The laws called Muslim Personal Laws are therefore not related to the religious life of the Muslims but their worldly life and, as such, are liable to change with the changing conditions of life.
2. Their next argument refers to the changes being freely made in these laws in the Muslim countries. How could these countries and their Muslim rulers change these laws had they been religious in nature?
3. Their third argument relates to the worldly interests of the Muslims themselves. To ensure justice to Muslim women and save them from being deprived of human rights, and to safeguard the interests of Muslims in a changing developing society their personal laws should be changed according to the changed condition ones.

Beneath the first argument lies the misunderstanding that the conception of religion and worship in Islam is the same as in the majority of other religions. Other religions do reject worldly life and regard the affairs of this life Satanic snares drawing one away from God. For the quest of God they drive man to the caves and the solitude of the jungle. But Islam

rejects this view. For it the way to God passes right through the affairs of this life on earth. It does not seek to circumvent or sidetrack it. The multifarious activities of worldly life and its complex problems are the very fields in which one can harvest the good of the Hereafter and earn the pleasure of the Lord. Real godliness lies in conducting all the affairs of this life in accordance with God's will, along with His worship and remembrance. This is why God has given man a complete code of life. There is not a single aspect of man's life which is not covered by His Commandments, all of which are meant for obedience by man, to whatever walk of life they belong. Discrimination between commandments relating to different walks of life would cripple the true religion. Like all other laws of Islam the Muslim Personal Laws belong to the indivisible whole of our religion, and assertions regarding their being alienable smack of ignorance about the very nature of Islam.

The second argument stated above is hardly any argument at all. Even if the Muslim Personal Laws have been freely subjected to changes in some of the Muslim countries it does not be hove a learned man to infer there from that these laws are in reality changeable. By a similar argument it could be made out that as the largest democracy, People's Republic of China, resorts to brain washing, anti-religious reprisals, compulsory labour and the commune system, all these practices are fully congruous with the democratic way of life, and should be adopted. One could go a step further and say that it is the height of conservatism, reaction and narrow-mindedness that despite the changed conditions people insist on preserving features of democracy developed long ago in France, Great Britain and the U. S. A. How shall commonsense react to such an inference? Can it be accepted, even for a fleeting moment, that whatever is being said or done in the name of democracy is *ipsofacto* raised to the status of a ruling in the way of life called democracy? If that is repugnant to reason why should justice be denied to Islam by treating as its authentic interpretation anything and everything that someone

claiming to be its adherent says or does? It is contrary to sound academic traditions to refer to amendments in Muslim Personal Laws by people who have borrowed their political, economic and social systems from the West throwing the Islamic injunctions overboard. They are people under complete sway of the West in their thought and action. The changes they have freely introduced in their personal laws are but one expression of their intellectual slavery to the West.

The third argument mentioned above is in fact a piece of advice. Even though coming from those ignorant of the realities of the situation we could have appreciated the sincerity of these well wishers, but we are puzzled by the spectacle that their urge of improving the lot of the Muslim women and furthering the good of the Muslim society lies benumbed when the life and honor of the Muslim women fall a prey to beastly attacks and when Muslims are killed and looted. How can we accept the bonafides of these advisoers and persuade ourselves to believe that they genuinely seek the good of the Muslim society? These people should be plainly told that they are ignorant not only of Islam but also of what the Muslims are. The Muslim Personal Laws being a part of Islam their observance is a necessary condition of one's being a Muslim. Muslims' welfare does not lie in surrendering a part of their religion but in steadfastly adhering to the whole of the religion.

This is the truth about the arguments given in favour of changes in the Muslim Personal Laws. Consciously or unconsciously the protagonists of change ignore the important point that in this issue, like every other issue, what is and what should be are two separate things. While expressing their opinions on what Muslim Personal Laws should be these people put across views as if they were describing what these laws in fact are. The real issue being discussed is the place of Muslim Personal Laws in religion; whether it is a part of it or not? Whether these laws ought or ought not to from a part of religion is an entirely different issue. That Question is irrelevant for the purpose in hand. Clear thinking and correct

reasoning requires that these two issues are not confused with one another. Whether these laws are a part of religion or not is to be decided by a reference to religion itself as enunciated in the Quran and Sunnah. One is free, however, separately to open a discussion on the other issue; whether these laws ought or ought not to form a part of religion? One is free to go further and assert that the whole set of ideas and the system of values behind these laws is false and worthy of being rejected. Indeed one is free even to reject Islam itself and argue his case as best as he can. But no one has the right to deny the existence of something explicitly laid down in the Quran and Sunnah or to claim that dispute explicit provisions therein these laws do not form a part of the religion. That this law is stated in the Quran and Sunnah and therefore a part of religion is a fact which every fair minded person must accept.

In view of the real nature of these laws which we have explained above it seems imprudent if not wrong to characterize them as Muslim Personal Laws. They are in reality the Islamic Laws for personal affairs, not 'Muslim' personal laws. That the man in the street does not distinguish between what is 'Islamic' and what is 'Muslim' makes it still more necessary to call these laws by their correct name. We hope it would help remove the current misunderstanding that these laws are merely the products of the social and cultural melieu of the Muslim people as are the laws of the other communities.

I would like to conclude upon a point already hinted at earlier. Only those laws form part of religion, and are therefore immutable, which are stated in the Quran and the Sunnah. This status is not enjoyed by the detailed rules and minor provisions of Islamic Law which developed in the later centuries through a process of *ijtehad* and inference from the law provided in the texts of the Quran and Sunnah. This part of the Muslim Personal Laws is changeable. The laws inferred from the basic textual provisions later on can be amended in accordance with the demands of the changing circumstances. This is generally true of all those details of the Islamic law which arose out of

*ijtehad* to whatever walk of life they might belong. But even amendment to these laws cannot be *'free'*. They have to conform to the juridical principles underlying textual provisions and must be in harmony with the norms, ends and values enshrined in the provisions of Quran and Sunnah some of which we have mentioned above. But a discussion of the conditions attaching to the task of amending these law falls beyond the scope of this brief paper which seeks to clarify the real nature of the Muslim Personal Laws.

Translated by M. N. Siddiqi

# CAN THE SHARIAH-LAWS BE MODIFIED

Mujtahid-al-Asr Maulana Syed Ali Naqi

*Head, Dept. of Shia Theology, A. M. U. Aligarh*

Changes in the Shariah-Laws have been proposed a number of times since Independence. The demand is now becoming more insistent, strength being derived from the alleged changes introduced in the Muslim countries in the name of reform and progress. It has become necessary to state the Shia view point in this regard, which I shall present in this brief paper.

Our basic postulate, as confirmed by Quran and Sunnah and endorsed by reason, is that the author of the Shariah-Law is God Himself. Even the Prophet, peace be on him, is not law giver, he is merely the agency communicating the Divine Law to man.

"And now have We set thee (O Muhammad) on a clear road of (Our) Commandment; so follow it, and follow not the whims of those who know not. (XLV: 18)

The prophet claimed no more than the status of a follower of the God given Law:

"Say, I follow only that which is inspired in me from my Lord." (VII: 203)

And Muslims are duty bound to follow the Prophet:

"Say, (O Muhammad to mankind) If ye love Allàh, follow me". (III : 30)

Following the Prophet means, of course, obeying the Law he has brought down to us:

"Then those who believe in him, and honor him and help him, and follow the light which is sent down with him: they are the successful" (VII : 157)

The 'Light' accompanying the Prophet refers to the Commandments which have been enforced by the Prophet in form of Shariah, which has abrogated the earlier Shariah. ("and he will relieve them of their burden and the fetters that they used to wear"). (VII: 157)

This obligation to obey directly follows from the faith referred to above (VII : 157). To change these laws and adopt a course other than that of complete submission to Shariah amounts to confrontation with the Prophet, characterized as an un-Islamic course of action bringing punishment to those who adopt that course.

"And whoso opposeth the messenger after the guidance (of Allah) hath been manifested unto him, and followed other than the believers way, We appoint for him that unto which he himself hath turned and expose him unto hell-a hopeless journey's end." (IV: 115)

As faith in the Prophet is not time bound any deviation from the Shariah as communicated by the Prophet cannot be permissible for the Muslims.

> "Thou wilt not find for Allah's way of treatment any substitute, nor wilt thou find for Allah's way of treatment aught of power to change". (XXXV : 43)

The Prophet taught the divine Law as gradually as the situations requiring particular laws arose. While some commands of God were made known to Muslims through the texts of the Shariah, there were others the occasions for whose teaching did not arise before the Prophet. God willed that the command lie in trust with the chief successors to the Prophet who are the 'People who rule' (ulu-al-Amr) to be

communicated when the occasion for doing so arose. This is why when the Prophet was publicly ordained to communicate whatever had been revealed unto him (V: 67) as the first step in an arrangement meant to continue till the Day of Judgment, it was also declared simultaneously that the 'Religion' had been perfected.

"This day have I perfected your religion for you and completed my favor unto you, and have chosen for you as religion Al-Islam" (V: 3)

The laws of Shariah handed down by the unerring Imams are interpretations of Divine Law through the agency of the Prophet. They too were not law-givers on their own. It should now be easily understandable why we cannot accept a claim to law-giving by any human agency. How could we concede this Law to erring beings when the Prophet of God and his unerring successors have no such authority? Such Law-making is characterized as the *bidah* (innovation), referred to in the Prophet's tradition:

> 'All (religious) innovations stray you from the right path and all that strays you from the right path leads to hell."

*Bidah* as we understand it does not refer to something new, but changes and modifications in the Shariah, whether in form of addition, deletion or alteration.

The doors of *Ijtehad* are of course, open. But *Ijtehad* means efforts to discover the Shariah-Law, and not the attempt to make the Shariah-Law.

Let me elaborate upon this point. A complete code of life was communicated to the *Ummah* by the Prophet and his successors. Laws relating to some points of detail could not, however, reach us due to the time-gap involved. While large number of laws are supported by clear texts, there are some for which the relevant texts could not be discovered. Textual laws do not admit of any *Ijtihad;* hence the universally agreed

principle that Ijtehad in face of textual provisions is prohibited (*haram*). There is however some scope for a special type of a *Ijtehad* to determine the meaning and purport of a textual provision in cases involving complicated reasoning relating to the meaning of the text such as:

(a) In case of words having several meanings the desired one to be specified in the light of the context and other relevant considerations.

(b) In case it seems possible, on circumstancial evidence, that a word connotes a meaning other than the literal one.

(c) In case of a general term amenable to particularization, or

(d) In case of an unconditional statement capable of being subjected to some conditions.

In some cases *Ijtihad* is needed to reconcile seemingly conflicting texts. As regards cases in which there is no text directly applicable, we have to look into principles of law and rules of procedure established by the Shariah and decide which of these fits the case under consideration. *Ijtehad* of this nature was always there and shall always be there.

Doors of such *Ijtehad* are never to be closed. But it is confined to efforts at discovering the Shariah Law. Modification in law that is proven in the Shariah or making a new law are ruled out for ever by the cessation of Revelation. No Muslim individually has a right to do so, nor can all Muslims taken together claim such an authority. No Government, even if it is a Muslim Government, have any power to make laws or modify the laws of Shariah. Wherever such an act has been perpetrated, it is decidedly an anti-Islamic act, even when the perpetrators be the Muslim States.

Translated by M. N. Siddiqi

# MUSLIM PERSONAL LAW

Maulana Mohammad Ishaq Sandelvi

For quite some time the issue of abrogating the Muslim Personal Law in India has been debated in political circles. Hindu leaders generally favour the total abolition of Muslim Personal Law and enactment of a uniform civil code for all communities irrespective of creed or religion. In Government circles too the dominant majority holds the same views. But for certain political reasons they are waiting for an opportune moment to initiate appropriate action.

A fairly large number of the Ulema, many well-known religious institutions and the commonality of the Muslims have unanimously warned the Government that any attempt to amend Muslim Personal Law would be tantamount to interference in their religious affairs and that it should desist from taking any such step. But it appears that these entreaties have failed to produce any impact on the Government intentions and, on the contrary, the daily *Qaumi Awaz* has recently given us the news that the Government has finally decided to proceed in this direction.

It is high time the general public be educated on the real nature and significance of Muslim Personal Law, so that it may realize the extent of injustice and pain such a step is likely to cause the minorities.

## The Meaning of the Muslim Personal Law:

Muslim Personal Law, is in fact, another name of the cultural and social freedom of the Indian Muslims. It implies essentially that Muslims are free to maintain their cultural

entity and abide by Islamic Shariah in certain specified fields and that in these fields courts of law will adjudicate in accordance with Islamic Laws. In actual practice, however, this freedom is limited to divorce, inheritance, endowments and other related matters. During the British period these matters were, in general, decided in the light of Islamic laws and the practice continues down to this day.

**Its Position in the Muslim View**

Personal Laws of even the non-Muslim communities inhabiting India remained safe during the British regime. It was the national Government which first touched the Hindu Law and made various amendments in it. The Hindu Code Bill drastically modified the formerly current Personal Laws of the Hindus.

For instance the new code has, in contrast to the customary shastras laws, conferred on the females the right to inheritance. Judging on this precedence, the Government thinks itself not only justified in amending the Muslim Personal Law, but also regards it as a step in the right direction, although the two are basically different.

Among other communities living in India such cultural laws are nothing else but social practices and customs raised to the status of law. This assertion is borne out by the fact that their leaders and social reformers frequently initiate the move for abrogation or amendment of these laws. For example a fairly large number of Hindu leaders and reformers have expressed their opposition to the prevalent practice of demanding money from the parent of the bride amongst Hindus. Even Gandhiji advocated numerous similar reforms in the structure of the social laws and quite a few people accepted these suggestions.

It is quite different with the Muslims. Whosoever from amongst the Ulema or leaders tried to bring about certain

reforms in the Muslim Society, asked the people to shed off customs and social conventions and rally round the shariah in sincere faith. Not a single instance can be cited where any Muslim reformer called for the abrogation of a law of Shariah or asked the Muslim Society to indulge in practices contrary to the Shariah. Neither is it possible to get such an example, for the simple reason that in the eyes of a Muslim, reform implies nothing else but that he should keep to the path of Shariah and reduce the distance between himself and Islam. All those who have ever advised the Muslim to transgress any injunctions of the Shariah have been termed atheists and mischief mongers and not as reformers by Muslim commonality. This fact aptly uncovers the vast difference between the nature of Muslim and Hindu laws. The former is well defined and precisely formulated and transcends social customs and traditions. It is immutable and brooks no change. The latter, however, is changeable.

One of the important distinctive feature of Islamic law is that it is wholly religious and hence inalienable from it. It is a fact which has been admitted even by legal experts. Yudhishthra in 'A Text book of Mohamedan Law' referred to it conceding that Muslim religion and Muslim law are so fused together that it is practically impossible to draw the line of demarcation between the two. In the word of justice Mahamud 'Mohomedan Law cannot be alienated from their religion and belief', (Govind Dayal Vs. Inayatullah (1885) 7A 11 at 781).

**Bases of Muslim Law**

The laws of marriage, divorce, inheritance, wardship etc. which form a part of the Islamic Shariah relate essentially to the social aspects of the human life. With that end in view Islam has taken due care of numerous corners of the world. Nevertheless it is only the formal aspect of the matter. It is their basis which forms the true essence of these laws. The following few lines are an elaboration of the same point. Islam

has presented to mankind the outlines of a distinguished and wholesome society whose moorings are well entrenched in faith and belief. Whosever studies the Islamic teachings thoroughly would inevitably reach the conclusion that each and every part of its moral and practical injunctions is inextricably linked with the basic faith and philosophy it offers.

**Kinds of World Religions**

To know the relationship between faith and practice, or more appropriately, between faith and living, it is advisable to understand the peculiar nature of Islam itself. To make things clear it would be useful to cast a fleeting glance over the world religions, their bases and moorings.

From this view point we can classify world religions-both current and extinct-into two broad categories despite the vast differences that exist between them. Some are those that believe in 'revelation' from God as the only final source of guidance and others that consider 'reason' or *Kashf* or *Ilham* as the final authority.

Islam, Judaism and Christianity, in spite of the vast differences between themselves are agreed on the principle that the only source of guidance is the Revelation from God. The judgment of reason or *Kashf* or *Ilham* carries no weight if it conflicts with whatever is known from the divine revelation *(Wahy)*. And no one has the right to amend, scrap, change and distort it. This is the reason why, the Christians and the Jews, although in practical life they have eschewed religion, still adhere to those social conventions that have got attributed some how to divine revelation *(Wahy)* and do not countenance any change in them. This is true even when, in our view, they have lost the original Old and New Testaments, and whatever currently goes by that name is so full of conflicting and contradictory statements-a conclusive proof of the charge that

the text has been corrupted-that one loses confidence in the authenticity of the Book of God.

As for the Muslims, their case stands on an entirely different footing. With us the 'Words of God' and the traditions of His Prophet are safe and wholly intact. Our religion is complete and comprehensive. All walks of life, whether they relate to beliefs and rituals, or dealings and social intercourse have been perfectly illuminated by the Shariah so that Islam becomes a complete code of human conduct. And such aspects of social conduct too has come under the purview of Muslim personal Law are either stated in the texts thereof or derived from the Quran and Sunnah. It is therefore, impossible even to think of any alterations or change in them.

The bed-rock of our religion is the Quran and the 'Sunnah'. They are the only sources of Shariah, the spring from which the nectar of life gushes forth to sustain our existence. They are the same and not different sources. For the Quran was sent unto he holy Prophet and was later conveyed to us through him. And hence, we can justifiabley assert that the source of our Shariah is really one-that is obedience to the holy Prophet (peace be on him), the soul of Islam and its foundation. This is in fact a distinguishing feature of Islam a fact admitted even by non-Muslim experts in law.

**The Relation with faith (Iman)**

The discussion in the preceding lines makes it quite clear that the Muslim Personal Law is unlike personal laws of other peoples. It is neither a collection of laws framed by an individual or a group of wisemen only to meet temporary contingencies, nor does it flow from the accumulated treasure of human wisdom and foresight. On the contrary, it is a set of laws given to us by that All Powerful Creator of things who is omniscient and knowledgeable and revealed unto the holy Prophet through formal texts or informally through intuitive acquisition, taking into consideration the actual and potential

needs of all times to come. And hence, no human wisdom or intellect is entitled to effect any change in them.

The faithfuls who believe in Allah and His last Messenger Muhammad (peace be on him) consider these laws as commands from Allah and therefore obligatory in character. To effect, on one's own choosing, even a slight change in it is highly sinful.

**Blessings and Threats**

Although the Holy Quran is not particularly concerned with laying down detailed instructions yet a fairly large number of these are enshrined therein. It is these that are called in the Indian legal terminology as Muslim Personal Law. Quite a few of the laws of inheritance have been ordained in the Book itself. Instructions relevant to Nikah have been expounded in detail and the rules for divorce have been specified in the Book. But Quran has not only described them: it has persuaded the faithfuls to abide by them and warned them against default. For instance in the verse subsequent to those laying down the rules of Divorce the Quran says:

"These are the Limits imposed by Allah. Transgress them not. For whoso transgressed Allah's limits: Such are wrong doers." (II : 229).

Thus the effect of any transgression from or amendment to the injunction regarding divorce will be limited not only to worldly evils and losses but will be extended to the life hereafter. And such as overstep these limits, commit a great sin and are wrong-doers in the eyes of Allah and deserve punishment in the Hereafter.

Similarly after laying down the laws of inheritance Allah says: "These are the limits (imposed by Allah). Whoso obeyeth Allah and his messenger, He will make him enter Gardens underneath which rivers flow where such will dwell forever. That will be the great success. And whoso disobeyeth Allah

and His messenger and transgresseth His limits, He will make him enter Fire, where such will dwell forever: his will be a shameful doom."

These quotations make it quite clear that the laws of inheritance are not viewed simply as a part of social behavior but they have a metaphysical aspect too. And it is this aspect which is far more important, for the default or amendment and abrogation of this law may be the cause of failure and retribution of Hell in the Hereafter. To strive to act on them will surely end in success in the Hereafter and entry into *Jannat*. In the face of these promises and threats, no Muslim has the right to violate, amend and abrogate them. The question of Muslim public opinion is not relevant in this connection. Should the entire Muslim community the world over agree to change or abrogate the aforementioned laws, this move would still be called illegal and erroneous and considered sinful from the Islamic point of view. Nor do the so called Islamic governments enjoy any right in this field. To cite as precedents the doings of Muslim governments is beside the point. Whatever the argument to abrogate or amend the Muslim Personal Law any such step will be tantamount to interference in the religious affairs of the Muslims and cause them immense pain.

## Modern Age and the Muslim Personal Law

There are some who go on harping the hackneyed argument that times have vastly changed. They claim that conditions today are far different from that they were 1300 years ago and hence these Islamic laws will have to be changed or scrapped altogether. But in fact this is a weak argument. Those who advance this argument should clearly specify the extent and nature of the changes that necessitate amendment in Muslim Personal Law. They should mark out clearly the social problems where the Islamic Shariah does not give a clear or satisfactory answer, and is not capable to offer a solution. As

long as no concrete examples are offered the argument that times have changed remains ambiguous and gets reduced to an exercise in pointless intellectual disputation.

Islamic Shariah is a set of eternal and timeless rules, such that can take in its stride all possible changes and meet all possible situations as and when they arise. It has taken due care of human needs and difficulties and even laid down a systematic mechanism for the same. They are in complete harmony with human nature and effectively answer its basic urges and hence they are the least affected by the rise and fall of civilization or changes in situations.

The problem is closely linked also with the very existence of Muslims as a distinct cultural entity in India. It is an indisputable fact that the life of a community, as a separate and distinct entity depends on the retention of such characteristics as clearly differentiate in from others. When it loses them its distinct character is lost and it merges with other communities whose attitudes it has adopted.

Marriage, divorce and inheritance are matters of basic importance in this context. Differences in their modes and procedure mark out nations and communities and lend them independent and distinct life. Although beliefs are far more important providing the base for practical life yet they remain concealed in the privacy of the hearts. It is difficult for a stranger, to perceive them without making ingenuous efforts to explore them. Observance of religious rites is comparatively more but not so prominent as to equal the modes of social behavior. It is an aspect of these very modes of social behavior with which Muslim Personal Law is concerned. If an opening is made once to permit amendments and or abrogation of the whole or part of Muslim Personal Law it will mean that Muslim community will lose most of its distinguishing features. And as a result there of its distinct cultural life will end gradually merging itself with the dominant cultural group.

No individual or group is entitled to some inherent rights. If it were so, no legislation to define 'rights' of persons or groups would be needed. Strong difference of opinion has existed between various countries and different periods of history in the same country with regard to what constitutes a right. In one country the owner of a price of land enjoys certain rights which are not recognized in another. There was a time when Zamindars in Oudh had limited judicial power, within the precincts of their landed property. They were empowered to confiscate the lands of the tenant or even expel them from the village. Later, however, the government abolished these privileges.

The above example makes it clear that Law is not prepared to recognize that "rights" of a legal person are self acquired and inherent. Thus right is something which is conferred. But who confers it? The question is quite pertinent and has been one of the basic issues debated at length by the jurists. The essence of these discussions and the widely held opinion of experts in secular law concur that only a State has the authority to confer a right on a legal person. None else is competent to do so. This is a principle accepted in all secular States.

On the contrary, Islam holds this as an exclusive prerogative of Allah, the Creator of man and the universe and their Nourisher. A Muslim believes that a legal person- an individual or people- acquire a right only when the Shariah, which is sent by Allah and formulated by Him, confers it. And it is He only who can revoke it, through His Book and Traditions of His prophet or briefly the Shariah. None else except this very Shariah is competent to confer or revoke a right.

This makes the distinctive features of the Muslim Personal Law manifest once again beyond doubt. If any of the so called Muslims ever imagines that the right to change Muslim Personal Law, is a proven prerogative of the state or any other authority, he certainly deviates from the above mentioned basic

principle of Islam And this is not a deviation in action only: its repercussions are far wide and extend over to one's tenets of faith drawing him away from Islam and closer to apostasy.

In the chapters of social life falling under the Muslim Personal Law the question of acquision of a 'right' is prominent and basic. One's right to inheritance and the extent of his share therein does not happen to be at the discretion of or pleasure of the deceased. An aggrieved father can severe relations with his son during his life time but cannot deny him the right to inheritance. For this is a right conferred on the son by the Shariah and it is the latter only which is competent to revoke the same. The right to guardianship has been suitably defined and granted to by the Shariah to certain persons in accordance with a definite order of preference. As for Wakfs (endowment) the objectives are defined and channels of expenditure determined by the self same authority. Marriage according to Islamic Shariah, is a sacred social contract between two parties; yet they are not completely free to impose any terms and conditions they deem expedient. Some of these conditions automatically follow the solemnization of marriage even if the parties to the contract had not the slightest idea about them. The right to add certain other conditions is recognized but within limits. In some cases additional terms and conditions, even though mutually agreed upon by the parties concerned, are considered null and void if the Shariah declares them unnecessary and unlawfull. The secret of this peculiarity of Law lies in the fact that the rights both the parties enjoy are not inherent and self acquired but given by Shariah. Even the very right to enter into such a contract has been given by it. A Muslim does not enjoy unrestricted freedom in this respect. Let us illustrate this point by an example. If a Muslim enters into marriage contract with a polytheist, the said contract is not recognized by the Shariah and is declared null and void. Similarly marriage with two real sisters at the same time is illegal according to Shariah law and the contract void. The reason is not far to seek. It is the exclusive prerogative of

Shariah to confer this right and also to determine its terms and conditions, which cannot be overstepped.

The foregoing discussion suffices to highlight the fact that a change in the Muslim Personal Law or its abrogation, in full or part is totally unacceptable to a Muslim. Even a Muslim State is not competent to take such a step and if it does so it is certainly tantamount to interference in religion. Nor it is permissible for government of India to follow suit.

**Constitutional Validity**

The Indian Constitution ensures cultural and religious freedom for all, particularly the minorities, of which the Muslims from the largest group. The Government has therefore no constitutional right to take such a step. However if the Constitution is suitably amended to validate such a step it will, even if legally valid, constitute a most deplorable breach of promise. And the move will be written down in history with black borders. It will also mean going back on solemn assurances given to the minorities by both succeeding Governments at the time of Independence.

**Need for Review**

In the end I should like to say a few words on an important problem. The set of laws prevalent in the name of the Muslim Personal Law were codified by Justice Amir Ali. With all his insight into jurisprudence and the matter of legal importance, he was no expert in Shariah. Moreover he was a Shia by his sect. He was not conversant with the Sunni Law. Consequently he made certain mistakes while transcribing these laws. Later, when legislation based on these erroneous statements were made, everything jumbled up. In many cases 'Customs' have been given the status of Shariah Law, even though some are quite contrary to the teachings of Islam. All this makes it necessary to undertake a thorough revision of the provisions of

the present set of laws prevalent in the name of Muslim Personal Law.

A group of learned Ulema, legal experts and jurists, should undertake this job, review the laws and suggest necessary amendments in the light of Quran and Sunnah. This would also offer a suitable opportunity to take cognizance of the changed circumstances and suggest adjustment or improvements wherever necessary. Islam has an inbuilt mechanism to accommodate changes in social and economic life and thus make Islamic Shariah a living force. Surely it is a stupendous task and has wide implication. Only a group of devoted researchers who are enthused with Islamic spirit can take this work in hand.

Translated by Omar Afzal

# MUSLIM PERSONAL LAW:
## SPECIAL PROBLEMS

# POLYGAMY

*(Some question and their answer)*

*Maulana Syed Ahmad Qadri*

*Editor Zindagi,* Rampur

The most criticsed aspect of the Muslim Personal Law is that which permits polygamy. Some ten, twenty years back, the nature of the objection was that it was conservative in outlook and licentious in intent. The Orient a lists and the Christian fathers had, in general, painted it so black that their accounts made the modern educated Muslims bow their heads in shame. However the appalling conditions of the European society (where monogamy is in force) and the forceful rebuttal of the objection against polygamy soon dispelled the misunderstandings created in this connection. Seeing this, the Orient a lists and their hangers-on changed their tactics and strategy of attack. Now quite a new and novel explanation and interpretation of the relevant verses of the Quran is being offered, and permission for polygamy is being subjected to a condition which is found neither in the Quran, nor in the Tradition, nor in Muslim jurisprudence nor even in the fourteen hundred year-old practice.

The manner in which discussion on the subject is carried out now is brought out by the following four questions. These same questions are put forward repeatedly, in changed words of course. If intelligible and reasonable answers to these questions are furnished, the nature of the problem and its religious significance would become clear by itself. I have

thought it advisable to adopt this brief method for this Seminar. The said four questions are as follows:

1. The third verse of the fourth Sura occurs after the second one, and it seems that the third verse also relates to orphans only. By reading the third verse in this light it seems that the permission to marry two, or three, or four women of one's choice concerns particularly the orphans and therefore does not apply to women in general. Hence it would be advisable to cite some other verse of the Quran which applies unequivocally to all women.

2. Is it not true that many Muslim males were killed in wars, and the problem of their orphaned daughters and widows had cropped up? It was to solve this problem that the permission was given to marry orphans and widows up to four. As such it was never intended to be an open permission for polygamy.

3. What is exactly meant by "justice" in the verse concerned? To describe it as meaning "the duties of husband and wife", as some people do, is of little use in judicial matters. Have some more precise things been said about it?

4. The protagonists of equality among women claim that they should also be accorded the right to marry two or more husbands at the same time. Do we have any reasonable answers for these women? Can a Muslim woman make this demand?

Before providing answers to these questions, it is desirable to set forth some general principles regarding the understanding of the Holy Quran. I am of the opinion that it is due to the ignorance of, or disregard for, these principles that even those who sincerely wish to know the religious position of the problem miss the point.

**Some Important Principles of the Comprehension of the Quran**

The basic principles to be followed by a sincere Muslim for understanding the real meaning and purport of the verses of the Quran and the injunctions derived therefrome are as follows:

1. The Quran was not revealed all at once, in a book from. Rather it was revealed piecemeal and gradually, in relation to the arising situations, over a period of 23 years. So it is necessary that the background of the verses, and the occasions for their revelation be well ascertained.

2. The Prophet of God was not only charged to read out the verses of the Quran to the people, he was also entrusted by God with the responsibility of explaining the revealed laws by his words and deeds and as such he happens to be the final authority. Hence it would not be legitimate either on religious or rational grounds to by-pass his own practice and exposition in determining the meaning and purport of any of the Quranic verses.

3. After the Holy Prophet, it is essential to keep his companions' explanations and interpretations in view. It is by no means legitimate to overlook them. The Quran was revealed in their own language; they were educated directly by the holy Prophet and acted upon the Quranic teachings under his supervision and guidance. They were the people addressed by the Quran in the first instance. Hence it would be entirely wrong to cast aside their practices and ignore their explanations and interpretations.

4. Next to the companions of the holy Prophet are the Persons who devoted their lives in learning the Quran, the Tradition and the Islamic Law and acquired mastery in these branches. It is necessary to take due

cognizance of their commentaries, explanations and views. Every reasonable person admits that in a legal matter the views of a person who has an expert knowledge carry weight and are worthy of trust. Obviously, the Quranic law cannot be an exception to it.

5. There are many Quranic injunctions which are not new but improvements on former laws. That is the laws that were already in vogue; the Quran reformed them, and purged them of wrong accretions through the said injunctions.

6. It follows naturally from the above principles that the Quran is not a Book whose injunctions and laws have not yet been elucidated, and acted upon. This book has a long history behind it. The laws and injunctions expressly laid down in the Quran have already been defined, explained and applied to practical life in the time of the holy Prophet himself. In addition, there are hundreds of injunctions which have attained unanimity (*Ijma*) ever since.

There is not a single principle among the said six ones which is unreasonable and unintelligible. We are furnishing answers to the above questions in the light of these very principles.

**The answer to the first question**

The translation of the second verse of the 4th Sura (Nisa) is as follows:

> "Give unto orphans their wealth. Exchange not the good for the bad (in your management thereof) nor absorb their wealth (into your own wealth). Lo! That would be a great sin."

After the second is the third verse (of the same Sura), which is under discussion at the moment. It runs as follows:

> "And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives), that your right hands possess. Thus it is more likely that ye will not do injustice."

The fundamental error of those who do not correctly understand the issue of polygamy set forth in the above verse is that they take the verse as the one permitting polygamy; whereas it is intended only to limit the number of wives to four under the already permissible practice of polygamy. It is an established historical fact that polygamy was in vogue in Arabia since quite long and her inhabitants often married more than four women at the same time, while some of them had as many as eight or ten wives at one time. This was never considered as a social enigma but something worth taking pride in. All the same, two very glaring evils had crept in that tarnished the institution of polygamy. The one was that they did not maintain equality among their wives; and the other was that when they could not meet the expenses of the large number of wives, they misappropriated the property of the orphans living under their charge. Besides that they had invented some other methods of harassing the orphans. The said verse effected two reforms in the prevailing practice of polygamy. Firstly, it limited the number of wives to four and no Muslim could thereafter keep more than four wives at the same time. Secondly, it imposed the stringent condition of meeting out equal treatment to all the wives.

Moreover, we find no revealed law which does not permit polygamy. All of us are aware that Prophet Abraham had two wives at the same time. We also know that Prophets David and Solomon had at one time more than one wife. This goes a long way to show that polygamy prevalent in Arabia was not an

invention of the Arabs but was derived from the revealed law. The Arabs had, however, corrupted it. Islam purged it of these corruptions; and as a result of that, it was fully reformed.

By keeping the above facts in view it is easy to find answer to question number one. The gist of this question is that the verse is taken to apply to orphans only. Since it is also taken to be the one permitting polygamy, it is further argued that the permission is limited only to orphans and does not apply to women in general. That is why the questioner has demanded reference to some other verse for the substantiation of the alleged permission of marriage with several non-orphans at the same time. It has been made abundantly clear above that it is wrong to take this verse as a proof of the permissibility of polygamy. The verse has not been revealed to legalise polygamy but to limit the number of wives sanctioned under it. To demand proof for the legality of an act which is already lawful, and has not subsequently been prohibited, is quite unwarranted. It is also not correct on the part of the enquirer to think that the verse pertains to orphans only. We are discussing the problem at some length later. But even if the argument is accepted for the time being, the most that would come out of it is that the permission for polygamy has been reiterated in the context of the permission for marriage with orphans. This in no way effects the main problem. And if someone says that non-orphans do not come under the purview of the verse, it would mean that the permission for marriage with four women, at the same time is limited to orphans only; and the other women are exempt from this limit. That is, marriage can be contracted with more than four non-orphans at the same time. If not, why? Can the disputers in question point out to us any verse of the Quran that imposes the limit of four on marriage with non-orphans? Or can they city any verse that disallows marriage with more than one orphan at the same time? Does Quran have such verses?

The fact is that the verse under discussion was revealed to restrict the already prevalent polygamy, and to subject it to the

condition of equity, irrespective of whether multiple marriages were contracted with orphans or with women in general.

For a further clarification of the point, I give here the example of another injunction, which is essentially linked with marriage, and closely resembles the injunction of polygamy. Take into consideration the 229th verse of the second Sura (al-Baqara). Its first part is as follows:

> "Divorce is to be pronounced twice, and then (a woman) must be retained in honor or released in kindness."

Is this verse a proof of the permissibility of divorce? If someone thinks that the said verse was primarily, and specifically, revealed to permit divorce, he would be wrong. The reality is that divorce was prevalent in Arabia, like polygamy; and was also unrestricted, like the latter. The Arabs kept divorcing and taking back into their wedlock women with whom they got angry; and there was no limit to it. And that left the poor woman in distress; that is, she was neither treated as a wife nor set free, so that she could marry someone else. The said verse of the Quran put an end to that atrocity by fixing the numbers of the reversible divorces (Talaq-e-Rajaee). It fixed the number of the reversible divorces at two; and the succeeding verse (No. 230) laid down that the right of reunion (after the divorce) would terminate after the third pronouncement. The number of divorces was limited to three only. The commentator Ibn Kathir has to offer the following comments on the basis of the statements of Ibn Jarir, Abu Daud, Nasai, Tirmizi, and other traditionists:

"In the beginning of Islam, the case with the divorce was that a person divorced (a wife of his) as many times as he liked; and then he went back upon his pronouncements during the period of waiting (*iddat*). Thus a member of the Ansarian clan said to his wife in anger that he would neither spend nights with her, nor would set her free: he would divorce her and would take her back into wedlock during the period of waiting,

and would go on doing that endlessly. The woman made a complaint to the Prophet of Islam in person, and apprised him of the situation. Thereafter the said verse was revealed limiting the number of reversible divorces to two only and withdrawing the right to reunion after the third."[1]

From the above it follows that the verse in question was intended only to rectify the prevalent practice of unlimited number of divorces among Arabian people. The same is the case with polygamy also. I have dwelt at length on it to dispel the misunderstanding of such people that mistakenly consider the third verse of the fourth Surah as the one permitting rather than restricting or defining the scope of polygamy.

**The Authentic Commentaries of the Verse**

Now we want to make it clear that for thirteen and a half centuries, not even one amongst the commentators of the Quran and scholars of Islam has held the view that this verse relates to orphans only. Nor was it possible to do so. Only three alternative explanations of this verse have been chosen by the classical commentators of the Holy Book. One of these is attributed to Hazrat Aisha. Her nephew Urwa bin-Zubair had approached her for an explanation of this verse. In her reply she remarked:

"O my nephew! This is an instruction with regard to an orphan living under the supervision of a guardian, with whom marriage is permissible (such as her first cousin). The *wali* who already had a share in her property felt attracted towards her wealth and beauty, and wanted to marry her but was not fair to her in the payment of the dowry offering her less than what others would do. This verse put an end to that injustice, and made it obligatory for the guardians of orphans to pay the dowry that was their due if they wanted to marry them; and not

[1] Ismail b. Kathir (d 773 A.H.). Tafsir-ul-Quran al Azim (Egyptian ed.), Vol. I, p. 237.

to be unjust to them. And if they feared that they would not be able to do justice to them they should refrain from marrying those orphans and instead marry others of their choice."[1]

Hazrat Aisha's interpretation of the verse under discussion has been recounted also by Imams-Bukhari, Nasai, Muslim, Baihaqi, and other traditionists. In her opinion the word *"al-yatama"*, in the above verse, refers to orphans, and "al-Nisa" to women in general. The verse is intended primarily to ask the guardians of orphans to desist from marrying them if they feared to be unjust but in this context a limit has also been imposed on the unrestricted practice of polygamy. According to her, while the first part of the verse pertains to orphans, the second relates to women in general. This interpretation has been adopted by the majority of the commentators; and that goes a long way to establish the contention that the injunction regarding the permissibility of polygamy applies essentially to women in general.

Another interpretation of this verse has been attributed to Abdullah b. Abbas and his pupil Akrama. They say:

"In pre-Islamic times a person married as many as and even more than, ten women; and they used to pride themselves on the multiplicity of wives. As a consequence thereof when their own resources dried up they misappropriated the properties of the orphans under their care. Thereupon God prescribed the limit of four for marriage. He asked them to desist from crossing that number in view of the undue increase in their expenses arising out of the multiplicity of wives and the consequent tendency to misappropriate the properties of the orphans and do injustice to them. And if they feared that they would not be able to be honest and just in relation to the properties of the orphans even after that they should content

[1] Abu Ja'far Muhammad b. Jarir of Tabristan, jami-ul-Bayan fi Tafsir-ul-Quran (Egyptian ed.), Vol. IV, p. 144.
--Abu Ja'far Muhammad b. Jarir of Tabaristan, op. city., p. 145.

themselves with only one wife, or have recourse to slave girls!"**

In the opinion of Ibn Abbas too, the word "al-yatama" here defers to orphands-male and female both-and "al-nisa" to the women in general. This explanation also supports the view that the injunction regarding the permissibility of polygamy applies essentially to women in general. Iman Raazi has preferred this interpretation to other ones.

The third interpretation of the verse under discussion is attributed to Hazrat Said b. Jubair, Qatada and some other commentators. They say: Even in pre-Islamic times the Arab were averse to the misappropriation of the orphans' belonging. But they had no regard for women, and they were generally ill-treated. They married ten women, but did not mete out equal treatment to all of them. The verse asks these people to be afraid of doing injustice to the fair sex, in the same way as they are in the case of orphans, and to restrict the number of wives to four with that end in view. If even after that they could not be sure of fair treatment to their wives they should content themselves with only one, or in addition benefit from their female slaves.[1]

The difference between the first two interpretations and third one is that in the opinion of this latter commentator the verse does not concern the orphans, rather it relates to the rights of the women in general. It was revealed primarily to put a stop to the practice of unrestricted polygamy, and to the unequal treatment of the wives. This interpretation has been adopted by Ibn Jarir and other commentators. But according to the first two interpretations, it is in the context of prohibition of injustice to the orphans that a limit on the practice of polygamy has been imposed. Even so, that is not a fundamental difference.

---

[1] Ibid.,p.145.

The above discussion proves conclusively that it is wrong in every respect to consider the injunction regarding polygamy as something particular to orphans only.

**The Practice**

Now turn to the practice, vis-à-vis polygamy. History records numerous instances of the companions of the holy Prophet, their successors, religious scholars, jurists, and the communality of the Muslims marrying more than one woman at the same time; and it never occurred to anybody that the permission for polygamy is particular to orphans. It is possible to imagine that none amongst the Muslims since the time of the holy Prophet could understand the correct meaning of the third verse of the 4th Sura?

**Answer to the Second Question**

The answer to the second question is implied in the answer to the first one. But as this question is posed in different ways, it needs to be answered separately.

The assertion implied in this question is a mere figment of imagination. The texts of the Quran do not suggest it nor do the traditions. The background of the revelation of the verse stipulated in this question is corroborated neither by Islamic history, nor by the accumulated treasure of the classical commentaries. The assertion is quite wide of the mark; and the reasons for its being so are as follows:

1. It is based again on the aforementioned misunderstanding that verse No. 3 of the 4th Sura, was revealed to permit polygamy. On the contrary the verse was revealed only to limit the already permitted practice of polygamy, and Islam never intended to ban it altogether.

2. The existence of orphans in a society does not happen to be only a consequence of their parents being killed on war: even normal deaths may give rise to a sizable number of such cases. The Arabs victimized not only those orphans whose fathers were killed in battles, but tyrannized over those also whose fathers died a natural death. The verse in question has put a stop to the victimization of all kinds of orphans. As stated earlier one school of classical commentators hold this verse as the one intended to prevent injustice not to orphans only but to all women in general.

3. Conditional clauses have been used only at two places in the verse: firstly in the very beginning- "and if fear that...", and secondly in the middle- "and if ye fear that...." The first 'if' in the verse, concerns the situation when the guardians of orphan fear that they would not be able to do justice to them if they married them. In that case they are asked not to marry them. This conditional clause has nothing to do with polygamy; because marriage with even one orphan is made subject to considerations of justice. To prevent the occurrence of such injustice the verse goes on to remind the existence of other alternatives-that of the availability of marriageable women other than the orphan ones. The latter clause, however, does not refer to orphan mentioned in the earlier part of the verse: it refers to women in general and to the practice of polygamy. It enjoins upon a person who wishes to take a second wife in the presence of the first one, to search his heart and make sure if he would be able to be equally fair to both of them, irrespective of whether the new wife has been a virgin, a widow, or an orphan. An attempt to link the first 'if' with polygamy is thus borne out either

of misunderstanding or a deliberate distortion to mislead the ignorant.

4. Those who associate the whole of this verse with polygamy have not given thought to the impact of this association upon the meaning of the verse and upon their own objectives. Well, how can they said possibility be eliminated by marriage to not one such girl but to four? And how can such a marriage serve as a cure for injustice? Moreover, if as suggested by the inventors of the said interpretation, permission for polygamy has been given by Islam only for those times when as a result of war, widows and orphans multiply in the society why it has been made obligatory for the intending person to satisfy himself as regards his ability to be equally fair to all his wives? And if he is not sure, he is asked to marry only one woman. This is really strange. For the plentifulness of widows and orphans demands that one man marries several orphans and widows that their problem may be solved but further on such a condition has been set for polygamy that very few would dare to marry several girls and widows. Thus the imposition of this condition would serve as a stumbling block in the way of the solution of the problem. What all this comes to is that God offered a solution for the problem the first part of the verse; and then Himself set it at naught in the end. According to the Westernized people this verse places restriction on plurality of wives, and at the same time solves the problem of the numerousness of orphans and widows in the society. This is the paramount sense (of the verse) at which no commentator could get for the last thirteen and a half centuries. It is a novel effort to render the verses of the Quran unintelligible and meaningless.

**Answer to the Third Question**

The third query concerns the meaning of the word *'justice'* occurring in the verse. As would appear from the content by justice here is meant equality among wives, as regards conjugal relations, maintenance and upkeep. If, for example, the husband spends two nights with one wife and one with the other; or gives for monthly expenses, rupees one hundred to one wife rupees fifty to the other, or provides a spacious and comfortable accommodation for one and an uncomfortable house to the other, he is guilty of injustice. But if a husband does not discriminate between one wife and the other, in these and other similar particulars, he fulfills the demands of justice. If a husband has failed in this respect, the aggrieved wife can petition the Qazi, and if her claim is established, the Quazi is duty bound to force the husband to be fair.

The experts of the Islamic law have declared parity among the wives to be obligatory; and have also given a precise definition to it.

"Either a person has one wife or more, than one. If he has more than one, it is obligatory for him to be just to each and all of them with respect to conjugal relations, maintenance and upkeep. Even if he has two free wives, and two slave ones, he is required to maintain strict equality among them in the matter of foods, clothes, lodgings and conjugal relations."[1]

The above quotation gives a precise definition to the term justice and asserts the view that its implementations are obligatory. In support of his view the author cites verse no. 3 of surah Al-Nisa and comments as follows:

"Immediately after giving him permission to marry two, three or four women, God asks an individual to refrain from using it if he is not sure of his ability to strike a balance between different wives in regard to conjugal relations and

[1] Kasani (d. 587 A.H.), Bada' i us Sanai' (Egyptian ed.), Vol. II, P. 332

maintenance expenditure. It is clear, therefore, that if justice and equality were not obligatory, such a directive would not have been given. If discrimination between the wives has been prohibited, its opposite, equality among wives, automatically becomes obligatory."[1]

So much emphasis is laid on justice that, even among the wives of varying ages and beauty, nights have to be equally divided. Allama Kasani writes as follows:

"And in the matter of the allocation of turns, virgin (and) widow and elderly, old and new and Muslim and *kitabiat* all have to be treated equally."

Equality in love and natural inclination is, however, well beyond human competence and that is why shariat has not made it necessary. Verse 129 of Surah Al-Nisa is explicit on this point. Apart from this there is a general principle enunciated in the Quran to the effect that Allah does not encumber an individual with a responsibility he is unable to bear.

**Answer to the Fourth Question**

Someone from amongst the Muslim women who are enamoured of Western culture might, in their zeal to fight against polygamy, be persuaded to press their own claim to marry more than one husband. But it is difficult even to think of a modest and self respecting Muslim woman to adopt such a course of action. Our answer to such women is that there is no room for polyandry in the Islamic law. In the eyes of this law polyandry is synonymous with demolishing the very foundations of the family and society. Islam lays so much emphasis on the preservation of genealogy and family that it has taken special care to plug every crack that could have caused its disintegration. In the fourth surah (Al-Nisa), whose

[1] Kasani, op. cit., p. 332

verse no. 3 has just been discussed, several categories of women have been forbidden unto men for the purpose of marriage. Among these is the woman who is already married to someone; and this prohibition is of so high a degree that marriage cannot be contracted with the women whose husbands have died, or who have been divorced, even during the *iddat* period. Until their *iddat* period is over, none can marry them. An important reason for this is that if permission for marriage during the *iddat* period is given, there is the fear of the genealogy getting mixed up. Many of the Islam's injunctions rest on the proof of pure and definite lineage. If that is not forthcoming, all those injunctions would stand suspended. In this context it is sufficient only to refer to these injunctions their detailed explanation is not called for.

It may be said that to allow men to have several wives, and forbid women to have several husbands is against the principle of the equity, and an injustice to women. But a little thought would reveal that the said differentiation, between men and women, is neither prejudicial to women, nor against the principle of equality between the sexes. Rather, this differentiation between men and women, in the matter of marriage, is highly reasonable, and a blessing for women. The organic composition, inclinations, and sexual urges of man and woman are not the same. Man neither undergoes monthly courses, nor does he bear a child nor is he passive and impressible like a woman. Can a woman claim equality between the sexes, in these matters also? If in spite of these physiological differences man is asked to be strictly monogamous, a situation may and does arise where in the presence of one legal wife he develops illicit relations with numerous extra legal wives and concubines. Will a self-respecting woman instead of allowing her husband to have one more legal wife, permit him to develop, at his will, illicit sexual relations with whomsoever he so chooses? Unless a woman is really perverse she cannot opt for the latter alternative. The perversion of nature means that the moral values of chastity

and modesty become insignificant in her eyes. Besides, it is a matter of common experience that man squanders away much the greater part of his financial resources on his mistresses, and very little falls to the lot of the legal wives. From this standpoint also, it is incomprehensible why a woman prefers, or how can she prefer, the mistress of her husband to his second wife? By prohibiting adultery, permitting polygamy in times of need, and making parity among the wives an essential condition. Islam has put a stop to licentiousness and to wastage of resources on it and has thus opened the way to responsible relationship. On the contrary, the Western civilization closes the door on responsible relationship by permitting adultery, on the basis of mutual consent. One is quite at a loss to understand; therefore as to how could a Muslim woman reasonably opt for un-Islamic laws instead of the Islamic ones except, of course, when she has developed an aversion to the latter.

Even by disallowing polyandry Islam has not done any wrong to women. No woman in her right senses can demand it. If polyandry be permitted, it would generally happen that a woman would be the true wife to none; and her children would belong to no one excepting herself. If such a course of action were adopted it will certainly destroy the relationship of love and affection between a husband and his wife, the mutual respect and responsibility and the spiritual sustenance that they provide to each other together with the sanctity with the institution of marriage. Thus there would remain little likelihood of the formation of a wholesome human society. Can any women in her right senses really consider the sacrifice of all these things as giving justice to her?

As a matter of fact the demand for polyandry, if it has ever been voiced by any woman, has no sound basis for it except obstinacy and pure and simple sentimentalism.

**Position According to Shariat**

It is amply brone out by the above discussion that God has permitted the Muslims to have more than one wife, at the same time, provided that they do full justice to them. That is to say, the law of polygamy is not an invention of the Muslims, but a part of the comprehensive religious code granted to them by God. And the Muslims have been exercising this right of theirs since the time of the holy Prophet to this day. To tamper with it would definitely amount interference in religion. If some Muslim or non-Muslim administration, forces monogamy on Muslims, it would be a case of gross injustice; and the Muslims will oppose it as a religious duty.

*(Translation by Dr. Mumtaz Ali Khan)*

# POLYGAMY IN ISLAM

Mohammad Mustafa Ali Khan

*Lecture, Faculty of Law, A. M. U. Aligarh*

Partial and jealous writers in the West have, generally, misrepresented Islam. Particular care was taken by the Christian priests to keep the real Islam out of the reach of their folk and to present such caricatures of Islam that would be repulsive even to look at. The West, accordingly, leveled charge of originating and advocating polygamy against Islam and its Prophet. To know the truth behind this allegation it is necessary to make a brief survey of the world history relating to polygamy.

History shows that in all periods of human civilization polygamy has remained, and even today is, an important social institution. M. Letournean in his renowned work Evolution of Marriages say: "The most civilized nations must have begun with polygamy. It is law which has few exceptions."

Issac Taylor writes that polygamy is a most difficult question. Moses did not prohibit it. It was practiced by David, Soloman, Abraham and other reformers and Prophets in different stages of history. It was not directly forbidden even in the New Testament.

Among all the Eastern nations polygamy was a recognized institution. Among the Medes, Babylonians, Assyrians, Chinese and Japanese there was no restriction as to the number of wives a man could have. Polygamy was prevalent among Israelies and continued even after Moses. Among the Syro-

Phoenician races, whom the Israelies replaced, polygamy was degraded into bestiality.

In Sparta, because of female infanticide, the institution of polygamy and wife lending was recognized and practiced. The corruptness of morals in Persia, about the time of the prophet of Islam was deplorable. Men were notoriously voluptuous and to them women was nothing more than an object of the gratification of their passions. The Persians went in for a multitude of regular matrimonial connections, besides having a number of concubines. Dollinger says in his history of the Gentiles and the Jews that to the Persian their religion itself afforded a premium on the multiplicity of wives and concubines.

To the Athenians, the most civilized and cultured of all nations of the antiquity, the wife was a mere chattele, marketable and transferable to others and a subject of testamentary disposition. An Athenian was freely allowed to have any number of wives.

Among the Romans the freedom of women, the losseness of the tie which bound them to man, the frequency with which the wives were changed or transferred, be taken, in fact, the prevalence of polygamy under different names. Among the Iucans plurality of wives was always allowed. Polygamy was not expressly forbidden even by Jesus Christ. John Milton in his Treatise on Christian Doctrine quotes many passages from the Bible in defense of polygamy. So among the Christians, polygamy flourished in a more or less pronounced from until forbidden by the laws of Justinian. It however, still continued in practice until condemned by the modern society. St. Augustine himself seems to have observed in it no intrinsic immorality or sinfulness, and declared that polygamy was not a crime where it was legal institution of a country. About the middle of the 16$^{th}$ century, Burnardo Ochinus, General of the order of Capuchins, wrote in favour of polygamy. Seldon

proves in his Uxor Hebracia that polygamy was allowed not only among the Jews but likewise among all other nations.

Hallam in constitutional history of England points out that a German reformer, even so late as the 16th century admitted the validity of a second or a third marriage contemporaneously with the first, in default of issue or other similar circumstances. Higher classes of Germans, as also many English Aristocrats and Royalties, indulged in polygamous marriages even up to the 19th century.

The emperor Valentine II, by an edict, allowed all his subjects, if they pleased, to have several wives. The succeeding Emperors practiced polygamy and people generally followed their examples.

Hindu Laws and customs were, till recently, extremely unfavorable to women. Before the enactment of the Hindu Marriage Act 1955, there was unrestricted polygamy in the Hindu Society. Fraternal polyandry was also practiced among the Hindus.

Schopenhauer frankly admits "we all live, at any rate, for a time and most of us always, in polygamy." The great philosopher further exclaims "there is no use arguing about polygamy, it must be taken as de facto existing everywhere and the only question is how it should be regulated."

Encyclopaedia Britannica asserts that "as an institution polygamy exists in all parts of the world."

Thus we see that when Prophet Mohammad came with the laws of Islam, about six hundred years after Christ, polygamy was an established institution in all countries and in all religions. It had been rather an established institution in all countries and in all religions. It had been rather an established institution from time immemorial. No religion or social system seriously condemned it. The Prophet of Islam did what he could in the limited circumstances, keeping in view the social, moral, and natural requirements of the society. Islam by

limiting the number of wives and laying down strict conditions for having more than one wife at a time has introduced a radical change and reform in the social conditions of human society. Polygamy is, therefore, both checked and regulated in Islam.

Thus the greatest and most reprehensible mistake committed by the Western writers and now by some non-Muslim jurists and also by the so-called enlightened and progressive Muslim writers in India, is to suppose that the Prophet of Islam either originated or advocated polygamy.

## The Nature and Extent of Polygamy Tolerated in Islam

Sura Nisa verse 3 is the only verse of the Quran from which the permission to marry more than one woman is derived. The verse may be translated as "Take in marriage such women as please you, two or three or four, and *not more*. But if you fear that you cannot act equitably towards so many marry only one or what your right hand possesses; this is more proper that you deviate not from the right course."

The important point to be carefully noted here is that this verse *does not enjoin* polygamy. It only permits polygamy and that permission, too, is given on a very strict condition, i. e. if one can be equitable between the wives. If he cannot be equitable, he is bidden in plain language to marry only one.

Ignorant writers have not only attributed polygamy to Islam, as if it was a purely Islamic institution, but have tried to make it obligatory for every Muslim to have more than one wife. As no other verse in the Holy Quran permits polygamy, this one point becomes crystal clear, that polygamy is by no means obligatory upon Muslims. On the contrary, those Muslims who indulge in polygamy and do not observe equality between the wives or do not fulfill the financial obligations, they commit a sin, because they go against the plain injunction of the Quran to be monogamous if they cannot be equitable and

discharge the financial obligation. Is there any religion which makes polygamy a sin even in particular circumstances?

The verse when analysed and examined proves to be a barrier against the practice of polygamy, instead of being a certificate for indulgence in polygamy. The condition of equality between wives, in theory, is a near impossibility in practice. Verse 129 of the same Sura (Nisa) states: And you will not have it at all in your power to treat your wives alike, even if you fain would do so." Sura Al Ahazab mentions: "God has not given a man to hearts within him." These verses read with sura Nisa verse 3 leave no room for any doubt that Islam has checked and discouraged polygamy and has adopted in so doing its usual course of appealing to human nature.

Islam, according to Martin (pp. 263-264 Great Religious Teachers of the East), puts a check on the unlimited polygamy, by limiting the number of wives to four a man could marry under unavoidable circumstances, provided he could do and show equal justice and love to them all, while prescribing monogamy for all who could not act equitably and justly towards and make provision for more than one wife, and thus closing practically the door of polygamy for the vast majority of Muslims. And as Leonard (pp. 130-131, Islam, Her Moral and Spiritual Value) points out "In a greater measure polygamy in Islam is much more a theoretical than a practical institution." This can be corroborate and verified from the actual data of polygamous marriages in any country, particularly in India. Here not even 1% Muslims practice polygamy. Dr. W. Leitner (p. 297, Muhammadanism) has rightly remarked "now as practically none can be, as a rule, equally fair and loving to two or more wives, the spirit of Islam is clearly in favor of monogamy.

The polygamy is, therefore, as much opposed to the teachings of Islam as it is to the general progress of civilized society and true culture. Polygamy in Islam is, in a word, a remedy. It is exception rather than the rule. It has its uses and

abuses. Islam guards against the latter and allows the former under restrictions and within stringent limits. More knowledge of human needs and exigencies would enlighten the world and enable it to see the necessity of allowing and recognizing an institution like polygamy with its rare and limited use as in Islam.

## Social, Moral and Natural Justification of Polygamy

A question may arise, "Why did Islam even permit polygamy under any conditions"? The answer is that Islam permitted restricted polygamy with a view to meet social, moral, economic and natural eventualities. The verse which conditionally permits polygamy was revealed after a murderous battle-the battle of 'Uhad'. Several male Muslims were killed reducing the male population. Many young Girls who had become orphans and the widows of the martyrs required support, shelter and protection. There was then a situation which made polygamy a necessity. The constitution of human society is such that on particular occasions men are more wasted. In Europe, the 1st and 2nd world wars created a similar situation. Similar situation arose in Algeria because of freedom movement and similar situation is being created in Viet Nam and Middle East. And a similar situation may arise anywhere in the world. Prophet Mohammad was a religious teacher. He was a moralist. He, therefore, could not recognize 'unmarried mothers'. He could not encourage 'war babies', nor could he ignore human nature. Single life for a woman is not natural. A woman in health and with natural vigour, if condemned to single life, will suffer the consequences of ignoring the demands of nature. Modern society may condone or connive at adultery, Mohammad the Prophet of Islam, could not. He had only two alternatives either to permit polygamy under restrictions, or to encourage immorality, corruption, adultery and illicit sexual connections. He selected the former as a lesser evil.

Nature also seems to favour polygamy. Lord Morley George Raleigh Scott declared that by nature man is essentially and intrinsically polygamous. French Sexologist, Dr. Le Bon holds, "A return to polygamy, the natural relationship between the sexes, would remedy many evils, prostitution, venereal diseases, abortion, the misery of illegitimate children, the misfortune of millions of unmarried women, adultery and even jealousy." James Hinton remonstrates: "A forced monogamy is responsible for many of the evils of prostitution and leads to hatred and quarrels, to intense jealousy in women which turns purity into corruption."

Dr. Rom Landon observes: "In an imperfect world such as we live in, polygamy must be considered both natural and legitimate. To eliminate polygamy we should first have to change the entire character of our society and civilization, the nature of man and finally the Nature herself." Prof. N. W. Ingells in an essay 'Biology of Sex' writes: "Man as an animal is anything but monogamous, and one would have great difficulty in explaining, biologically, such a sudden change of heat, the transition to a single wife." So the recognition of polygamy in Islam is to check nature, to regulate nature, to improve nature but not to defy nature. (Thus polygamy, one is compelled to say, is not a disease or a curse as some turncoats think, but it has great utility and performs important social function and that is why Islam has permitted it.)

On Socio-economic grounds a second marriage becomes inevitable under certain special circumstances e. g. wife's barrenness, perpetual illness, unsuitability for cohabitation and the like. The second marriage is possible either in addition to or in place of the first one. Islam opted for the former, because the latter pre-supposes dissolution of the first marriage, which is bound to be a curse rather than a blessing to the divorced wife in the above circumstances. You can realize what will be the fate of the unfortunate woman divorced under such circumstances. History provides glaring examples of such miserable situation. Social and moral reasons in support of

polygamy may be understood and appreciated more clearly if we look into the social and moral life in the so-called civilized countries where monogamy is the form of marriage recognized by law.

M. Gustave Le bon says that so-called monogamy in most of the European countries is a sort of compromise between celibacy and polygamy. He further remarks that monogamy exists in modern Christian lands in books only. It is not practiced, and so although there is no legal validity for polygamy the condition of society is worse than it would have been under a polygamous system. According to him, the statistics show that in France adultery increased 10 times after 1826, the year in which polygamy was legally prohibited.

Max Nordon writes that man lives in a state of polygamy in the so-called civilized countries in spite of the monogamy enforced by law. M. Le Play goes a step further and say that polygamy is a social necessity under certain conditions of the society. Mrs. Annie Besant says "The true and righteous sex relation between one man and one woman is preached as an ideal in most of the civilized countries but is generally pracised in none. Islam permits polygamy; Christendom forbids but winks at it provided that no legal tie exists with more than one woman. There is pretended monogamy in the West, but there is in fact polygamy without responsibility. The mistress is cast off when the man becomes weary of her and sinks gradually to be the woman of the street, for the lover has no responsibility for her future, and she is a hundred times worse than the sheltered wife and mother in the polygamous home. When we see thousands of miserable women who crowd the streets of towns in the West during the night, we surely feel that it does not lie in Western mouth to reproach Islam for its polygamy. Prof. Gibbs at the end of his book "Modern Trends in Islam" rightly remarked. "Until the Western World puts its own house in order, it is no use asking the Islamic world to do the same."

It is better for a woman, happier for a woman and more respectable for a woman to live in a Mohammadan polygamy, united to one man only with the legitimate child in her arms and surrounded with respect than to be deduced, cast out into street perhaps with an illegitimate child outside the pale of law-unsheltered and uncared for, to become the victim of any passerby, rendered incapable of motherhood, despised by all.

So polygamy with all its evils has counter-balancing advantages. The strictly regulated polygamy in Islam is infinitely less degrading than the promiscuous polyandry which is the curse of most of the civilized countries.

There is one point more which should not be lost sight of in this connection. It is this that woman herself is responsible, to a great extent, for the existence of the institution of polygamy. If all women were to refuse to marry a polygamous man there would have been no polygamy left. The existence of polygamy shows that women tolerate it. And if this tolerance is, as it always was, to avoid a greater evil, then polygamy is certainly not a curse but a blessing.

Considering the above mentioned social, moral, economic, natural and special factors in support of polygamy, it was quite prudent and logical for Islam to recognize and tolerate in a limited form, this important social institution. The beauty of Islam is this that while it has stopped immorality and purified the society, it has by no means encouraged polygamy.

# SUGGESTIONS

I pointed out earlier that, in fact, not even 1% Muslims practice polygamy, yet I concede that out of this negligible percentage in more than 90% cases the husbands contracting a second marriage, in the life time of the first wife, do not care

about the limits and restrictions laid down even in the Holy Quran. Such misuse of the permission accorded in Sura Nisa, in my opinion, is not due to any defect or deficiency in the substantive law on this point but is due to lack of machinery for effectively enforcing the requirements laid down in the said Sura.

So, in fact, the substantive law on this point does not need any change but some procedural and administrative steps should be taken to provide judicial safeguards, so that the injunctions of the Holy Quran are implemented in their true spirit. It is here, I feel, that the state can, with the help of Muslim jurists and Ulema play its role. Islamic thinkers have never failed to appreciate the initiative which the state must take and the positive role it must play if the social, moral and legal objectives are to be achieved. The Prophet himself is reported to have said:

"Allah restrains with the state what He does not restrain with the Quran."

But here we must not forget the fact that just as ordinary civil and criminal laws cannot be interpreted by any and everyone and a change in any such law needs proper investigation, assessment, analysis and legislation, similarly Islamic law also needs expert investigation, analysis, assessment and legislation.

1. I, therefore, submit the following suggestions for consideration that an Act or Ordinance, as promulgated in Pakistan in 1961, may be provided in India whereby in case of barrenness, unsuitability for cohabitation of the wife or on any other just cause a husband may be allowed to contract second marriage after obtaining a verdict from an Arbitration Council. Such a Council should also judge the financial and physical competence of the applicant and may provide for maintenance of the

first wife and children of the first wife in suitable cases.

2. That a person contracting a polygamous marriage without an award of the Arbitration Council should be made punishable with fine or imprisonment or both.

3. That a marriage contracted without the award of the Arbitration Council should be held void without prejudice to the legitimacy of children of such marriage. This will act as a deterrent measure for women also.

# PERSONAL LAW PROBLEMS

S. A. Shafi, P. C. S.

*Special Judge, (Retd.) Delhi*

Muslims of India are now a days facing lot of problems. One of them is personal law which is the domain of the Ulema. Unfortunately they look at everything leisurely and that too from orthodox point of view. Things are allowed to drift till it is too late. When Napoleon invaded Egypt they instead of asking people to met him at the front, advised them to perform a Khatam of Bukhari Sharif. As the performance was going on, Napoleon's army entered the city and everything was over. Similarly when Tartars invaded Turkistan they advised the Muslims to have Khatam-e-Khawjgan. This did not help them and the enemy forces occupied the country. Now whenever there is a talk in parliament or provincial Legislatures to frame a Uniform Law for all sects and religions, they raise hue and cry, and on Government's assurance of non-interference in their personal law, they sleep over it, and never give serious thought to the problems that are affecting the very vitals of their community *Ijtihad* is not resorted to which is so very essential these days and for which the responsibility is with the Ulema.

As Special Judge in Delhi dealing with personal law for the last fifteen years, I am in a position to make suggestions to them in the light of my observations. First of all I may clear one point, that there is no question of making any alterations or changes in the Fundamental Laws of Islam. All that is required is to enforce them in the spirit, in which they were ordained.

Malpractices have crept in, and they should be stopped once for all.

The question is whether the Muslim women nowdays are treated with fairness as required by Quran. Islam no doubt allows polygamy, but at the same time it has provided measures for the prevention of the abuse of polygamy. It is allowed on strict condition that equal justice is done to all true wives. It does not give any latitude whatsoever to ignore the first wife, and desert her, or the children, without making any arrangements for their maintenance. Instances have come to my notice that people marry merely for the sake of pleasure without the least thought about the future of their first wife or the children. There are rulings to the effect that the first wife cannot be compelled to live with her husband against her wishes on the pain of severe penalties without assurance of equal and fair treatment to her. In the absence of any cogent explanation, the court will presume that the action of her husband in taking second wife involves cruelty to the first and it will be inequitable for the court to compel her against her wishes to live with her husband, and the court will be justified in denying the decree for restitution of conjugal rights (Bada Mian Vs. Badder, 40 Indian case 863 – AIR Calcutta page 511). If therefore any restrictions are placed on the second marriage there will be no harm, as it will benefit lot of poor women who become the victim of their husband's whims.

In Pakistan it has been laid down that persons who want to marry a second wife, should satisfy the court or a tribunal as to why the second marriage is necessary and what arrangements have been made for the maintenance of the first wife or the children. If similar safe grounds are provided in India there will be absolutely no infringement of Muslim law and at the same time it will provide a measure for the future prospects of the first wife and the children.

It is a common practice in India to announce divorce three times at one and the same time without assigning any reason,

whatsoever, or even making arrangements for the payment of dower amount, future maintenance or returning of dower articles (*Jahez*). The underlying idea is to misappropriate jewellery of *Jahez*. This is not in consonance with the spirit of Quran which requires that sudden announcement of divorce three times and at one and the same moment is sinful. It enjoins to have intervals of one month (*Tahir* period) at each announcement. There is no provision in law to consider such announcement as void or illegal. This point should be well thrashed out and made part of the law. The husband should not be allowed to divorce his wife once without sufficient reasons or making arrangements for the payment of full dower amount, jewellery, and *Jahez* of his wife. At present she has to file a separate suit for this claim. If she has no money to fix court fees, she feels helpless and practically ruined. In the absence of list of jewellery or *Jahez* duly signed by the parties, it becomes extremely difficult to prove the same. In case of oral *Nikahs* she cannot even prove the exact dower amount. It is, therefore, therefore, to get a Qazi Act enacted, which soould make it necessary to have *Nikah* compulsory entered in the register, together with the amount of dower and complete list of *Jahez* and *Charhawa*. It will prevent misuse by people to take advantage of non-existence of any documentary evidence. Some 20 years ago Mr. Kazmi introduced an act in Parliament but it was rejected because it gave certain judicial powers to the Qazis which could not be accepted by the Government.

## Qazi Act

I think the time has come to regulate the appointment and dismissal of Qazis by enforcement and amendment of the Qazi Act (1880). The self-appointed hereditary Qazis should not be allowed to practice till they have obtained a certificate of appointment from the District Judge. The appointment and dismissal should be made on the recommendations of a recognized Muslim Organization of the District.

The benefit arising out of registration are obvious and can easily be approved. Registration of marriage as is done at present in the case of Civil marriages will provide evidence and give also in detail, the terms of contract between the partties. The documentary evidence will dissolve most of the difficulties regarding the dispute about the dower amount, legitimacy of the children and misappropriation or disposal of the dower articles, *Jahez* or disposal of Jewellery of the wife by an unscrupulous husband.

I have received many complaints from the women regarding the disposal of their jewellery and other dower articles by their husband who often deny the same. If the List of dower articles and *Charhawa* of husband are entered in the register of the Qazi along with the dower amount and the signatures of both parties obtained, it will put a check over the despotic whims of the husband and stop him from disposing of her wife's dowry. There are also cases in which wives leave the husband with his jewellery and other articles. They do not return the same and live with their parents at their instigation and usurp her husband's presents. If a full list of all articles is noted in the Qazi's register it will stop making false allegations for misappropriation of their valuables against each other.

I have also noticed Qazis performing *Farzi Nikah* on the instigation of disinterested parties. In one case boy and his parents approached the parents of the girl with the proposal of the marriage, but on their flat refusal they entered into a conspiracy with the help of the Qazi who performed the *Nikah*, obtained forged evidence of *Vakil* and other witness in the *Nikah Nama* register. The boy kept quiet for a few months and then gave a notice to the father of the girl to send the girl to his home and not to detain her unnecessarily after the *Nikah*. The parents of the girl were simply astounded to receive such a notice; meanwhile the boy (husband) filed a suit for restitution of conjugal rights against his so called wife and the parents. The case was contested; the *Vakil* or witness on behalf of the girl appeared but the evidence was naturally full of

discrepancies and could not stand the test of veracity. The case was dismissed. The plaintiff and the Qazi were prosecuted for forgery and cheating.

**Shameful Connivance.**

In another case a *Nikah* was performed even with the connivance of the father who accepted money from the husband. A suit was then filed in the court. The girl disclaimed all knowledge about her marriage and proved that she was not even present at Delhi on the day of performance of *Nikah* and as such she could give no consent to her father or anyone else. The case was dismissed and prosecution of Qazi and the plaintiff recommended.

There may be many more instances of this nature. This is a problem which should be taken very seriously. It is true that under the Muslim law, a marriage can be performed without a Qazi, provided there are offer and acceptance. But in the present state of affairs, it has become absolutely necessary to stop repetition of such *Farzi* Marriages. Economic conditions have deteriorated so much and the difficulty in getting a good match have arisen to such an extent that even the unscrupulous parents sometime hurriedly marry their daughters on accepting handsome amount or on promises of getting substantial jewellery or property for their daughter. It, therefore, becomes very necessary that the consent of the girl should be taken before the marriage, and it should be thoroughly investigated whether the consent has been made voluntarily, freely in the presence of reliable witnesses send not under any restraint or coercion. Marriages contracted without free consent are null and void. An adult girl is free to contract a marriage without the intervention of any guardian, and to repudiate any marriage performed without her consent. Indian Contract Act expressly provides in section 10 that an arrangement is a contract only, made by the free consent of the parties, competent to contract,

and consent cannot be said to be free, when the consent is given on account of coercion and undue influence.

**Repudiation of Marriage**

In India the groom and the bride are almost never acquainted with one another. They may belong to distant localities or distant families. The marriages are arranged mostly by kins or friends or middle-men. Formal enquiries are made mostly regarding caste, financial status and education but generally they are not of searching nature. If a bridegroom looks good in appearance, is educated and at the same time an earning member or son of a rich family, the engagement is settled. There is not much time to enquire about the habits or the ideas of the groom or the bride. Defects of the groom or the bride are known only after the marriage. In one case before me for the dissolution of marriage, the groom was found dumb. On my asking the father of the girl as to why he had married his daughter with this person, he explained that he saw the groom sitting with his father and even put him certain questions but he kept quiet and answered by nodding his head. He believed that the boy was shy and that is why he was not answering his questions. Later on when the girl went to her hushand's place she discovered that her husband was dumb. On her return to her parents she raised hue and cry, but his parents told that, it was the will of the God and that she should abide by the same. The life of the poor girl was ruine for ever. In another case the groom was found to be insane, and the bride was suffering from epileptic fits. Complaints of impotency are not uncommon. Such being the case, should the bride and the groom have no remedy but to abide by the so called will of God?

This is all the more severe among the Hindus where the marriage till lately was considered indissoluble and a sacrament. Provision has now been made for their judicial separation but it even takes years to have it. Among the

Muslims, views are held by certain schools that if a woman ever acquiesced to the marriage knowing the defects in her husband, she could not claim divorce. This is indeed very hard and in my opinion ample provision should be made in the law that whenever a marriage is not likely to be happy, separation should take place as soon as possible. This is all the more important in the case of minor girls married by their parents. A number of cases have come to my notice in which the parents of the minor girls allow the Nikah of their daughters on mere money consideration, and actually barter them. In some cases the girls have to cut their academic career because the parents apprehend they may not be able to get a good match afterwards and engage their daughter hurriedly without considering the consequences whether the marriage at a later stage will ultimately prove beneficial to the girl or not. In order to safeguard their interest there should be every facility in providing option to repudiate the marriage particularly when it is to the manifest disadvantage of the girl and she finds that the differences in their age, status and education are so great, that they will never be reconciled. Similarly when a girl attains majority before the boy, she should be free to rescind the marriage by applying for the judicial separation and the judge should not ask her to wait till the boy attains majority.

At present a girl can exercise her right of repudiation only if she is given in marriage before attaining the age of puberty (15 years) but not after reaching the age of 18 years. In the present stage of society, it is hardly appealing. In India the bulk of Muslim community is ignorant of this provision in the Islamic Law, not to speak of minor girls who do not know at all that their marriage can be repudiated on attaining puberty. Personally I think that even if a girl acquiesced under pressure of her parents but afterwards finds that it would do her no good, she should be allowed to repudiate the same. It will be in consonance with the trends governing the present society.

Such a view was held in Lahore High Court in a case (Mussamat Makhan vs. Hyder) that Mohammadan girl was

entitled to exercise her right of repudiation within reasonable time from her knowledge of marriage and also from knowing the facts that she possessed such a right to repudiate the marriage on attaining puberty.

In cases in which she was not aware that she had such a right to repudiate, Imam Abu Hanifa is of the opinion that the option could be extended up to the time when she becomes aware of this right. Ignorance of law in their opinion is not considered excusable. But Imam Mohammad is of the opinion that the right continued till she became aware of it. This view was accepted by the High Court in case Malka jahan Vs. Askari (26 W. R. 26). In the light of this ruling, I should go a step further and suggest that the whole case should be put again before the girl on attaining puberty and she should be clearly asked in presence of the witnesses preferably those who were present at the time of *Nikah* whether she acquiesced in the marriage. Her confirmation should be taken in writing and a note to this effect should be made in the same *Nikah Nama* register. Without confirmation the marriage should be considered void. In one case a girl married another person by repudiating her first marriage without going to the court and confirmation by the Judge. It was held that she was not guilty of adulty or bigamy. She could marry someone else of her own choice after repudiating her first marriage.

**Prophet's Precept**

The attitude of the Prophet in this respect is illustrated by the well-known instance of Zainab, the wife of Zaid-bin Sabit who did not like her husband on account of ugliness. She approached the Prophet and stated that although she had no complaint to make against her husband, regarding his morals or conduct, yet she did not like his appearance. The Prophet asked her to think over the matter twice but when she finally expressed that she could not love him in any circumstances, he called Zaid and asked him what dower amount he had given to

Zainab. It was found that a garden was given to her. The Prophet asked her to return the same and give divorce, because the essence of marriage is peace of Mind, *Muaddat* (love), *Rehmat* (Sympathy of compassion) as deducible from the verse of the Quran 21 : 30, "and among His signs is that He created from among yourselves your mates so that you may find peace of mind in them and He put between you love and compassion most surely there are signs for the people who reflect." If peace of mind, Muaddat and Rehmat are not available in the marriage, life becomes miserable. If there is incompatibility of temperament or even dislike between the spouses, it is cruel to continue the matrimonial alliance and make the life unhappy.

In the farewell address at Hajjatul Widaa, shortly before our Holy Prophet's death speaking with the knowledge that he will have no other opportunity to address again, he said, "O, my people you have certain rights over your wives but so have your wives over you. They are the trust of Allah in your hands, so you must treat them with all kindness."

**Inheritance**

The question of inheritance of the children who lose their father during their life time and are deprived of all rights in their grandfather's property require serious consideration. Such children should not be deprived of their right of inheritance. This has been done in some Muslim countries.

Similarly the *Nisab* for *Qurbani* was prepared 1400 years ago. The times have changed. It becomes difficult to buy a Goat for a person possessing 52 tolas of silver and 7 tolas of gold. This requires revision by consensus of opinion.

These are some of the problems which require serious consideration by the Ulema. They should chalk out a code beneficial to the society particularly to the poor women who are sometimes the victims of the whims of their parents and later on maltreatments of their husbands.

# MUSLIM PERSONAL LAW:
## INDIAN CONTEXT

# MUSLIM PERSONAL LAW IN INDIA

Maulana Minatullah Rahmani

*Amir-e-Shariat, Bihar and Orissa*

What do we exactly mean when we use the word 'Muslim Personal Law'? Do we refer to the complete Shariah based on the Holy Quran, Sunnah, *Ijma* and the *Ijtehad* of leaders of Islamic jurisprudence or instead to that particular code which has been named 'Muslim Personal Law' in Clause 2 of the Shariat Act 1937?

As a matter fact Islam brings the totality of the life of its followers under divine command. This is the reason why Allah sent unto us commands relating to varied problems of human life, the holy prophet gave instructions or the companions of the holy prophet took certain decisions on fresh problems confronting them after mutual consultations of the leading Mujtahids formulated injunctions in the light of analogies, precedents, generalizations and principles. It is to the collection of all these rulings that they have applied the nomenclature Islamic Shariat. Subsequently when social needs grew as a result of the territorial conquests during the period of Khilafate Rashida and later, new laws were deduced keeping in view the principles of the Shariat.

Later when personal predilections started to dominate the governments of the day, the pursuit of their self-interest, the desire to retain political authority and personal supremacy forced these administratives to suspend the injunctions of Islam gradually and bit by bit and allow the family laws of Islam to

continue for the satisfaction of the religious aspirations of the Muslim populace. Thus Islam whose injunctions were obligatory in the same sense and to the same degree in both the personal and collective life of the community and its family and civic affairs fell a victim to bifurcation. The European political powers used this very tactics. They retained the personal law but enforced Roman Law in social and civic affairs. Today even after the attainment of freedom from European imperialism, the same law although with certain modifications continues to be enforced in the Muslim countries. The persons who hold the key to political power in these countries are the imitators of Europe in their preferences, thoughts and ideas and her true heirs. As a consequence doors of such modifications in Muslim Personal Law are being flung wide open that are either in direct conflict with Shariat texts or have no valid basis in the principles enunciated in Quran and Sunnah.

In such a situation the amendments affected in Muslim countries are neither authoritative for us nor acceptable without giving them due thought.

After the initiation of British domination and political power in India the Islamic Law, in its limited sense, together with the associated *Kiza* (Judicial) system was kept intact. Later, however, even these limited matters were transferred to the jurisdictions of ordinary courts but the Shariat Law was allowed to continue to govern the matters relating to the Muslims.

It was specifically stated in Section 2 of Indian Shariat Act 1937 that:

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift of or any other provision of Personal Law, marriage, dissolution of marriage, including Talaq ila, Zihar,

lina, Khula and mubarat, maintenance, dower, guardianship, gifts, trusts, and turst properties, and wakfs (other than charities and charitable institutions and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

At the same time it was clarified that although Muslim Personal Law, in its general meaning, refers to what has been briefly outlined in the Quran, and explained in Hadith or to the sets of decisions arrived at through *Ijma* or *Qiyas* by the four schools of Islamic jurisprudence, or for Shias those taken by the Holy Imams, but this wide sense has not been adopted in India. Instead Muslim Personal Law has been limited to inheritance, marriage, (Divorce, *ila, zihar, faskh*) maintenance, dower, and regulation of Awqaf only. And further, the Government of India Act 1938 Clause 223 waives the applicability of Shariat Act to cases where the respondents are no-Muslims. The above clause further stipulates that rights may be modified or curtailed by relevant enactments. Hence the Indian Contract Act struck off contracts from the purview of Muslim Personal Law, and stipulated that henceforth only the said Act will apply even if both parties to a contract happen to be Muslims. Similarly, interest transactions were taken out of the limits of Muslim Personal Law following the enactment of Indian Interest Act.

In the beginning the concept of Muslim personal Law was extremely vague. It is obvious that this vagueness caused considerable divergence of opinions with various High Courts expressing different opinion. With a view to rectifying this defect the Indian Shariat Act was enacted in 1937 which clearly indicated the jurisdiction of Muslim Personal Law limiting it to only inheritance, marriage, *Khula, Faskh,* divorce, *ila, Zihar, Moborat*, the right to preemption, mehar, maintenance and regulation of gifts and endowments. Hence the rules governing the proof of parentage were henceforth not included under the Shariat Act but were brought under the purview of the Law of Evidence. Thus in accordance with the

Evidence Act Section 112 a child born to a woman two hundred and eighty days after the expiry of her husband shall not be deemed as of proven parentage despite the fact that Hanafi fiqh prescribes the limit of two years and stipulates that a child born to a woman after the lapse of two years following the death of her husband shall be deed of proven parentage of the deceased husband.

The list given in the Appendix 7 to the Government of India Act 1935 enumerating the items covered by Muslim Personal Law includes the problem of Adulthood and Minority as well. Article 225 of the present Indian Constitution has sanctioned that all such laws as are in force prior to its enforcement shall continue to be enforced till such time as the provincial legislatures, or Parliaments, in exercise of their authority, do not partly or wholly set them aside. As a consequence to this provision both the Government of India Act 1935 and Indian Shariat Act 1937 are still applicable to the Muslims.

On the other hand the Constitution of India contains some Directive Principles of state policy. One of these namely, Article 44 reads "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

The above Article requires the enactment of a uniform civil code applicable to all, and the abolition of privileges enjoyed in this respect, by the Muslims or any other section of the Indian citizenry. The said clause should be understood in its perspective. Some quarters believe that religious, social and cultural uniformity from essential ingredients of the very concept of nationhood. In their view all the members of a nation must have one language, one script, one law of inheritance and one and the same pattern of socio-cultural set up so that perfect uniformity among each and all the constituents may be developed and cultural distinction may eventually fade out. On the contrary, Article 22 of Fundamental Rights enshrined in the Constitution of India

offers clear guarantee to the numerous cultural entities inhabiting the country that their separate languages, scripts, and distinct cultures will be protected and preserved. If and when a conflict arises between the two clauses – that is Article 29 (Fundamental Rights) and Article 44 (Directive Principles) – it is certain that the Fundamental Rights conferred on the citizens of India cannot be taken away through the use of the directive principles. Hence it is impossible to take any action under Article 44 so long as Article 29 continues to stay and is not deleted or amended as required.

The above discussion makes it quite clear that the issue of amendment in Muslim Personal Law raised frequently by some spokesmen of the Government or political parties has not been motivated by any noble desire to redress actual difficulties of the Muslim society arising out of the enforcement of some laws included in and governed by the Sharia Act. The real object is to put an end to the fundamental rights enshrined in and conferred by the Constitution- the rights to cultural and religious freedom- and to level down the entire Indian community to a uniform pattern of behavior by abolishing cultural distinctions. In other words it can be described as a movement directed against the belief of a Muslim that only Quran and Sunnah and Islamic Shariah merit obligatory obedience, by taking away whatever little freedom of action is available to the Indian Muslims to act according to the Shariat and thus force them to submit before human whims and caprices in these respects also and accept the overall supremacy of man- made laws and injunctions. From Islamic point of view such a situation can obviously never be permitted to arise.

The study of the Holy Quran leads us to the inference that there exist only two alternative ways of human behaviour. One consists in the obedience to the Holy Prophet Mohammand (peace be on him) and the other in obeying one's own desires and urges, the former is the true path while the latter leads astray and is *Zalal*. No third alternative is available. Allah says:

> And if they answer thee not, then know that what they follow is their lusts. And who goeth farther astray than he who followesth his lust without guidance from Allah. Lo! Allah guideth not wrong doing folk. (XXVIII, V.50)

Similarly while granting David worldly vicegerency Allah enjoined upon him to adjudicate only in the light of the "Truth" i.e., *whay* and desist from following the dictates of "Desire" (*Al Hawa*) that is, whatever goes against *wahy*.

> O David! Lo! We have set thee as a viceroy in the earth; therefore judge aright between mankind, and follow not desire that it beguile thee from the way of Allah. Lo! those who wander from the way of Allah have an awful doom, for as much as they forgot the Day of reckoning. (XXXVIII, V. 27).

A third verse in similar tenor may be cited wherein Allah has clearly demarcated two alternative ways of human conduct. One is the path of God-sent Shariat revealed to the holy Prophet Mohammad and the other consists in accepting the lead given by such person as do not believe in "Divine revelation". The Prophet and the community of his followers (Ummah) have been directed to adhere the revealed law and not to obey the dictates of their desires:

> And now We have set thee (O Mohammad) on clear road of (Our) commandment: so follow it, and follow not the whims of those who know not. Lo! They can avail thee naught against Allah. (XLV, V. 18)

Another verse exhorts the holy Prophet in unequivocal terms to act according to whatever has been revealed to him. Any evasion from this cou se amounts to leaving Allah and opting for the obedience to protecting friends beside Him:

> Follow that which is sent down unto you from your Lord, and follow no protecting friends beside him. Little do ye recollect! (VII, V.3)

Elsewhere in a verse the obedience to Allah and His Prophet has been defined as an obligatory course of action and a reference back to Allah and His Prophet in the event of disputes has been held as an essential ingredient of Faith (Al-Iman):

> "O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end." (IV, V. 59)

The Holy Quran has expressly stated in the following verse that a believer has no option left once Allah and His Prophet have taken a decision on any matter:

> And it becomes not a believing man or a believing woman, when Allah and His messenger have decided an affair (for them), that they should (after that) claim any say in their affair. (XXXIII, V. 36)

The Holy Prophet has similarly termed those constituting the greatest trial of the Ummat who ignore Divine revelation and alter the permissible into prohibited items on the basis of their own desires and intellectual disposition.

The Holy Prophet has thus observed: My people will be divided into numerous groups; the most corrupt will be those who decide *Deen* according to their views-prohibiting on that basis what Allah has permitted and legalizing what Allah has prohibited.[1]

Thus the Quranic verses and sayings of the Holy Prophet corroborate the view that we, as Muslims, have no option to

[1] Ilam-al-Moaqqien (vol. I P. 153)

evade or bypass the Shariat and instead follow our own self-made laws and codes of behavior. This always holds true whatever the needs of secularism and national integration. And what possible justification can be offered to destroy distinct cultures, languages, faiths and religious teachings after all these high sounding promises to ensure freedom of religion and guarantee protection to all these?

Let us turn to the second problem now. Is there any room for alteration in the Shariat Law to accommodate changing needs of the time, modern inclinations and the revolution in the social and political set up? If so, what is the mechanism for this change? In this connection, let it be understood clearly, that whatever the course of action, adopted by violating the limits prescribed in the Quran and Sunnah it will in effect lead us astray from the true path and mean ignoring the *Deen.* Allama Ibne Qayyim has classified opinions into three, namely the opinion positively erroneous, the right opinion and the opinion in which there is a room for doubt. He has divided the wrong opinion into a few such classes. In this context he observes; "One of these view-points is that which is opposed to the text. Its error and invalidity may be conclusively ascertained by referring to Deen-e-Islam and it is neither permissible to issue a *fatwa* nor pass a judgement on its basis even though some one has adopted this opinion by virtue of reasoning or conformity (*taqleed*)." Explaining a few other kinds of wrong opinion he has laid down a principle to the effect that the root cause of every evil happens to be the attempt to place reasoning over and above revelation and desire of the ego above intellect. "Everyone who has even an iota of wisdom knows the evils in the world and its disruption has been born of the preference of the opinion on revelation and desire on reason." Later he has asserted that wherever such a situation exists Truth will be supplemented by untruth and right path would be lost to ways that lead astray.

"Whenever these two wrong bases establish themselves in human heart its destruction becomes inevitable and if in a

nation, its affairs are sure to end in great mess. So that there is no God save Allah. How much of Truth has been destroyed by these opinions, untruth established, virtue effaced vice resuscitated, and what a number of fortresses of faith demolished and the religion of the Devil made to flourish."[1]

Thus the adoption of a course of action in matters of religion independently of the Texts of the Shariat and its principle would certainly defect its objectives and open the way to revolt against *Deen* and Divine commandments.

This is certainly a great error but to ignore the contemporary trends, social changes, needs and difficulties would be likewise and equally great mistake. For a failure of the Shariat to take due cognizance of new situation and the inability of Scholars of Islam to provide answers to the newly emerging issues and problems and their obstinate attachment to details of classical Islamic Fiqh would, in all likelihood, generate gradually dissatisfaction with Religion. In view of this I am of the opinion that right path lies in giving adequate and full consideration to the objectives of Shariat and the underlying spirit of its laws, on the one hand, and undertaking a search for finding solutions to the new problems and resolving the difficulties arising out of changed circumstances in the light of the general principle of Shariat, similitude and precedents, on the other. It is this very path that has been chosen by the companions of the Prophet themselves and by the eminent *Ulema* in all stages of Islamic history. It has been reported about Hazrat Abu Bakr that whenever some problem came up before him he first of all searched for its solution in the Quran and Sunnah and failing to get an answer in these two basic sources he would call a meeting of the companions of the Prophet for advice and would decide the matter in the light of these consultations.

"Said Abu Ibaid in his book (Kitabul Qadha) related to us Kathir b. Hasham who related it from jafar b. Yarkan who

[1] Ilam-al-Maqqien, pp. 67-68.

related it from Maimoon b Mehara that whenever some issue was brought up to him he would see into the Book of Allah and if he found in it something whereby he could decide it he did it and if failed to get that from there he would look into the Sunnah of the Prophet of Allah (peace be on him) and if he found something there to decide the issue he would do so, and if this source too failed him he would ask the people: 'Are you aware of any decision of the Prophet in this matter?' Often a group of people would stand up saying that he (Prophet) decided thus. And if he failed to get any Sunnah of the Prophet he would call a meeting of the leaders of the people and seek their advice and if they were unanimous on any opinion he would decide accordingly".[1]

"And Omar used to do likewise. If he failed to get anything in Al-Kitab and Al-Sunnah he would ask: 'Did Abu Bakr decide anything in this matter?' And if there happened some decision of Abu Bakr in this matter he would decide accordingly otherwise he would call a meeting of the knowledgeable among the people and consult them and if they agreed on some opinion he would decide accordingly."[2]

The above procedure has been further clarified by no less a person than Abdullah b. Masood, one of the most distinguished persons among the companions of the Prophet by virtue of his understanding and religious insight.

"Said Abu Obaid: it has been reported from Ibne Masood that on an occasion when many people had come to him he said: 'There was a time when we had nothing to adjudicate and nothing with which to adjudicate. And Allah led us to where you find us and hence to whomsoever and issue is brought up for decision he should decide it according to what is in the Book of Allah. And if there comes up a matter about which there is nothing in the Book of Allah or in the decisions of the Prophet, he should decide the same in accordance with what

[1] & 2. Ilam-al-Moaqqien p. 62.

the righteous people have done. And if there is an issue about which there is nothing either in the Book of Allah or the decisions of the Prophet or in the decisions of the righteous people, he should draw his own inference."[1]

This is precisely how Hazrat Abdullah b. Abbas used to proceed.

"It has been reported from Obaidullah b. Abi Yazeed that he said: I have heard Ibne Abbas when he was asked about something he would say what was in the Book of Allah, and if there was nothing in the Book but was available in traditions of the Prophet he would say accordingly. And if nothing was to be found in the Book of Allah or in traditions of the Prophet but was available in what was reported from Abu Bakr and Omar he would say accordingly. But if nothing was to be found in the Book of Allah or traditions of the Prophet or accounts of Abu Bakr and Omar he would draw his own conclusions."[2]

Moreover, Hazrat Omar has indicated the procedure of *Ijtehad* in a letter to Abu Musa Ashari in the following words:

"When you come across an issue which, according to your knowledge, has not been pronounced upon by the Book (of Allah) and the Sunnah and you are yourself clear in your mind as to what ruling would be proper in its regard, try to grasp the issue first. Find out similar and analogous cases. Then reason analogously, draw parallels, and go in for what in your opinion would be the (ruling) most desirable to Allah and nearest to the truth in that regard". (Al-Ashbah-wan-Nazair by Suyooti).

Hazrat Omar Farooq has similarly laid down a definite procedure to deal with new problems and to seek guidance in changed situations for all times to come. The Procedure may be stated as follows: the textual or reported precedent of decisions or laws relating to different issues that are available in Shariat should be kept in view so the issues and problems on which the

---

[1] Ibid, V. VI p. 62
[2] Ibid, V. VI. P. 72-73

texts are silent may be decided by striking a similitude between that former and the latter. At the same time the subtle difference between the above mentioned two categories of precedents has to be kept in view to avoid doubts. In addition to this he has pointed out the fundamental principle that the spirit of the Shariat Law and its objective should never be lost sight of so that in the process of drawing conclusion with respect to newly emerging issues the interests of the Shariat and its aims and objects are not defeated.

It is also evident from the life account of the companions of the Prophet that they adopted the same procedure. The *Ulema* and *Mujtaheedin* in every age had been similarly dealing with problems relevant to their periods keeping in view the objectives of Shariat and delicacies of their time. The books of Islamic jurisprudence are full of these examples. Hazrat Omar himself took numerous decisions taking into account the spirit of Quran and Sunnah and the expediencies of his time. For example both during the period of the Prophet (peace be on him) and Abu Bakr ladies visited the mosque but Hazrat Omar could foresee that the said practice would lead to evils. The Changed circumstances led him to the conclusion that the innocence of the eyes characteristic of the time after Prophet was no more to be found. Keeping in view the difference between the desirability of visiting the mosque and prevention of vice he stopped the visits of ladies to the mosque by an order. Likewise he accorded due consideration to the importance of *Jihad* and the necessities of war on the one hand, and the need to safeguard the Muslim society against corrupt practices on the other and set down four months as the maximum period for which warrior could stay away from his home. This is why the author of the book 'Al-Qadha-fi-Al-Islam has observed as follows:

"Omar strove to grasp the end in whose regard the verse was revealed and tried to understand the purpose for which the tradition came down and adhered to the substance and not the

letter . (thereof). (Al-Qadha-fi-Al-Islam. Book Qadha Omar P.14).

Similarly the later *Ulema* have always kept in view the changed circumstances and the needs of their time. Thus Abu Hanifa considers the presence of the defendant in a case obligatory at the time of its preliminary hearing recording of evidence and pronouncement of the judgment. In his opinion, the absence of the defendant at any one of these occasions could mean judgment against one who is absent and would therefore render the judgment in fructuous and inoperative. On the contrary, Abu Yusuf, who had greater practical experience in such matters, hold the presence of the defendant necessary only at the time of hearing and recording of evidence. Later the Ulema felt that sometimes the defendant did not appear nor was it possible to ensure his appearance and consequently a strict adherence to this condition was most likely to deprive hundreds of people of their legitimate rights thereby destroying the very dispensation of justice and protection of rights and suspending the operation of numerous laws of Shariah. In view of the above realization this matter was left to the discretion of the Qazi who on the basis of a circumspect assessment of the attendant circumstances of the relevant case, should decide the necessity or otherwise of the presence of the defendant.

Shaami writes as follows:

"It is stated in 'Jame-ul-Fusoolain' (that) opinions and assertions have varied in regard to the problem of judgment for or against an absentee. No clear and strong basis has been quoted or reported from them such that detailed inferences may be drawn from it without difficulty and confusion. And therefore it is obvious to me that (the judge) should deliberate on the facts of the matter and exercise caution and take cognizance of difficulties and needs and decide the legality or illegality (thereof) accordingly. For example if a person divorces his wife in the presence of sound witness and (later) disappears from the place and his (present) stay is not known

or is known but it is impossible to bring him back or for the wife or her agent to reach him on account of the distance or any other hurdle; and likewise a debtor who disappears but there is cash standing to his credit at his place or near. In such cases if claim is established against the absentee and the judge is convinced that (it) is right and there is no deception or cheating involved, he ought to pronounce for or against him. And also a *mufti* ought to pronounce (his judgment) on its legality with a view to removing the burden and the needs and protecting the claim against going by default even though the ruling is the product of his own judgment. This is the position taken by the three Imams (Schools of jurisprudence). However, in this connection two different views are said to be held by our own jurists. (In such a situation) an agent such as may duly represent the case of the absentee should be appointed. This view has been supported in "Noorul Ain" and is substantiated by what is to be found shortly 'Musakhar' and also in 'Al-Fath' in the chapter on 'untraceable' in (the following words): 'It is not permissible to pronounce against an absentee unless the judge deems it necessary for any reasons and (therefore) pronounces in his favour or against him and his ruling shall take effect for he is a *mujtahid* in the regard. In our view it is obvious that the above is true even if the judge is a Hanafi and belongs to our times; and in so doing such a judge does not violate anything for his suggestion subserve the ends of benefit and necessity.

Similar to the above is the problem of paid employment for religious duties pronounced illegal by the early jurists. Later the system of collective treasury fell into disorder, and the conditions worsened to such an extent that the only alternative to legalizing it was the risk of the extinction of Quranic education— a havoc which could not be allowed to happen. The scholars of the time appreciated its urgency and took into account the absence of any system of stipends for the collective treasury and also the lack of public zeal to ensure its continuance through voluntary contribution. In view of the above the *Ulema* and the religious elite of Bulkh legalized the

acceptance of wages for the teaching and education of Quran for in the alternative either the teachers of Quran and their families would be exposed to the danger of liquidation and the ruin of their families or the Quranic education itself would go by default. Subsequently payments on such religious services of symbolic significance as the call to prayer and *Imamat* were also ruled as permissible.

"Know that all the books of this school (of Islamic jurisprudence) including the texts, the commentaries and pronouncements are unanimous that paid employment for religious services is not right in our view. The later religious leaders of Bulkh made an exception in regard to the teaching of Quran and argued in explanatory notes to Hadaya that it has been done for fear of the wastage of Holy Quran. For the stoppage of gratuities from Baitul Mal and absence of the zeal to make payments voluntarily may oblige the teachers to engage in earning their livelihood and not to teach any one and thus the education of Quran may go to waste. So the later people pronounced on its permissibility and some of them allowed also employment for call to prayer and Imamat for the above stated reason, and because both of them are symbols of the *Deen* and in their default lies the demolition of the *Deen*. These are examples of exceptions made for necessity since necessity legalizes what is not permissible. (Fatawa Hamidiya p.127 V.2.)

A perusal of the books of Islamic Fiqh would reveal numerous examples of the Islamic scholars pronouncing a change in the rules subsequent to changes in *Urf* (widely approved conduct). *Urf* has been accorded an important place in the principles of legislation. The various stages of *Urf* and rules pertaining to each have been discussed in books of Fiqh in detail. Imam Sarkhasi writes in Mabsut:

"What is proved by the *Urf* is like what is proved by the Text"

In Rasael Ibne-Abedin it has been remarked: "Proof by *urf* is the proof of a religious (Shariah) argument."

In the beginning of the twentieth century, a *Darul Qaza* was organized in Bihar and Orissa together with the Imarat Shariah. When the *Quzat* associated with the above institution were confronted with numerous cases presented to them for adjudication, they had to recourse to new decisions to remove the difficulties in the light of the changed circumstances. As an illustration may be cited quite a large number of cases where the husband abandons his wife for one reason or the other and denies her right to maintenance and conjugal relationship. In the absence of any alternative arrangement for her maintenance the poor wife, frequently in her young age, is put to intolerable hardship. The classical Hanfi position holds that separation fro reason of the denial of maintenance expenditure by the husband is not tenable (Al Hidaya vol. 2 chapter on Maintenance p.419). It argues that the inability of a husband to perform the sexual act instrumental for procreation, which is the aim of marriage, cannot be equated with his refusal to bear the maintenance expenditure of his wife. (Al Hidaya vol. 2, p. 491). Thus they permit the wife to contract loans on behalf of the husband. Obviously such a position is flagrantly unfeasible in the present day socio-economic situational complex and may force a young married woman to compromise complex and go astray. In view of the above, and in the interest of preservation of the moral ideals of Shariat the *Darul Qaza* deemed it proper to pronounce separation on account of the failure of a husband to maintain his wife.

Thus we are experiencing many new situations. They call for an answer in the light of the Quran and Sunnah. Some of these newly emerging situations and problems are unprecedented, and hence the books of Islamic fiqh are silent in this regard, while others, though not new, yet are accompanied with entirely unique circumstantial context and hence require reappraisal in the light of the Quran and Sunnah and a new solution harmonious with the interest of the Shariat.

Both of these are only different aspects of the function of *Ijtihad*. The necessary qualifications that entitle one to *Ijtihad* are too stringent to be combined in one person today. Hence, in our view, this function should be collectively undertaken by a group of *ulema* thoroughly conversant with the Shariat, its principles, and values on the one hand, and the modern situation, the ideas and attitudes that go to constitute it, and the socio-cultural complex of the country in which they live. The failure to take up this challenge might be extremely damaging.

(Translated by F. R. Faridi)

# CHANGES IN MUSLIM PERSONAL LAW: SCOPE AND PROCEDURE

Maulana Syed Hamid Ali

*President, Idara-i-Shahadat-e-Haq, Delhi*

The Islamic Fraternity (*millat*) owes its existence to Islam and not to any country, race or language as is the case of other nations. It is therefore rather impossible to conceive of the Muslims, as individuals or groups, without their Islamic moorings. Any severance of relations with Islam on the part of the Muslims would amount to the death of the Millat, even though the Muslims physically survived.

Besides, Islam is not a religion in the prevalent Western sense of the word, which is supposed to concern itself only with faith and worship and not with other spheres of life. Islam on the contrary is a complete system and a way of life which provides guidance for every sphere of activity of individual and collective life. The Quran says.

Say: Surely, (as for) me, my Lord has guided me to the right path: (to) a most right religion, the faith of Abraham, the upright one, and he was not of the polytheists. Say: Surely my prayer and my sacrifice and my life and my death are (all) for Allah, the Lord of the worlds. No associate has He; and this am I commanded, and I am the first of those who submit. (Al-Anam-162-164).

The Quran and the traditions of the Prophet are replete with elaborations and elucidations of what has briefly been described here in the above verses. Everybody who has been cursorily read the Quran and the Sunnah know that the Quranic injunctions with regard to every sphere of life are as much binding on a Muslim as saying prayers and performing other

worships. This fact has been acknowledged even by non-Muslim jurists and other orient a lists. J. N. D. Anderson, who is considered an authority on Islamic Law in the West, has made the following observations in his book *Islamic Law in the Modern World*:

"But this fact leads directly to the second basic difference between these two systems of law, namely, that Islamic Law is enormously wider in its scope than Western Law. To the Western mind, Law...in the lawyer's sense ... may be defined for our immediate purpose as what is, or at least might be, enforced by the courts. Islamic law, on the contrary takes the whole of human conduct for its field... It thus covers every field of law ... public and private, national and international ... together with an enormous amount of material that we in the West would not regard as law at all"[1]

Later in the same book he says:

"Further, it covers every sphere of life and every field of Law"[2]

The third fundamental point with regard to Islamic law is its Divine nature, which not only makes it obligatory on the believers, but lends immutability to it. Man cannot alter or amend it, nor can he legislate in any sphere of life independent of this Divine Laws. The only right course for man to pursue is to obey his Lord, sincerely and entirely, wherein lies the hope of his success and prosperity in this life and the hereafter. The transgressor is doomed to failure here, and is certain to meet damnation in the Hereafter. The Quran says:

> And, for what your tongues describe, do not utter the lie, (saying) this is lawful and this is unlawful, in order to forge a lie against Allah
>
> (Annahl -116)

---

[1] Page 4 (N. Y. University p. 1959).
[2] (Ibid). 17.

> Or have they associates who have prescribed for them any religion that Allah does not sanction?
>
> (Shura -21)
>
> Follow what has been revealed to you from your Lord and do not follow guardians besides Him,
>
> (Araf -3)
>
> Then set your face upright for religion in the right state ... the nature made by Allah in which He has made me; there is no altering of Allah's creation that is the right religion.
>
> (Rum -30)

These verses make it clear that it is only for God to legislate; and that to concede to any one the absolute authority to legislate amounts to considering such ones a God's partners. Moreover the verses affirm the revealed character of the Islamic law and its being in tune with human nature. It being so, neither any change is desirable in it, nor is any person..., ...Muslim or non-Muslim ... competent to effect any such change. The laws, however, which are derivative in character, derived through *Qiyas* and *Ijtihad,* are liable to revision. Such laws have always undergone revision and change. In the following words Anderson has thrown light on this aspect of the Islamic law:

There can be no doubt that the first, and basic, and most obvious distinction of all between the two systems...is that Western law, as we know it, is essentially secular, whereas Islamic law is essentially religious." (p. 2)

"But Islamic Law...is essentially different, for it is regarded fundamentally as divine law...and, as such, as basically immutable." (p. 3)

This is the true status of the Islamic Law and the stand thereof of the Muslims. It is a Muslim's duty to submit his whole life to this Divine Law, and to strive for its domination

in those spheres of life which might be governed by laws other than God's:

> He has made plain to you of the religion what he enjoined upon Noah and that which We have revealed to you and that which We enjoined upon Abraham and Moses and Jesus, that keep to obedience and be not divided therein.
>
> (Shura -13)

**The Enforcement of the Islamic Law through different ages**

In the Prophet's own time and then during the period of the Righteous Chaliphate-the most exemplary, and glorious periods of human history-the Divine Law in its perfect form and true spirit held complete sway over the whole gamut of life, individual and collective. This resulted in the emergence of the ideal people, the ideal society and the ideal state. This was the time when all the problems that the Ummat faced were solved one by one, and it reached the pinnacle of glory as well as piety and righteousness, the kind of which was never before attained by any other people.

The period of the Righteous Caliphate was followed by that of the Unrighteous ones, which were caliphate only in name, whereas in reality they were hereditary monarchies. The caliph's election and removal, state's administration, and the public exchequer were all exempted from the hold of the Islamic Law. Transgression from the Divine law in State matters inevitably led to the degeneration of the society. Yet even in this period of decadence the Courts of law still judged according to the Islamic civil and criminal law. Similar dispensation prevailed during the Muslim period in India, and this state of affairs continued till the political and intellectual domination of the West.

It must, however, be borne in mind that at no time was this disregard of the Islamic law as well as the ruler's despotism

looked upon with approbation. The departures from the Divine law were never considered a step from conservative orthodoxy to enlightened progressivism. On the contrary, they were viewed as fall from the desired state and as degeneration, to change which there have all along been efforts, sometimes successful, by Islamic thinkers and reformers. At the time of the fall of the Moghul Empire, Syed Ahmad Shaheed, Maulana Ismail Shaheed and other men of piety and righteousness started a systematic movement to establish the Islamic way of life and the caplihate to be modelled on the Prophet's example. They laid their life for this cause. They have almost succeeded in their mission, when they were betrayed by their own people. Moreover these rulers of the degenerate periods of Islamic history never dared, in spite of their despotism and transgression from the Divine law, to formally scrap any part of the Islamic law and to replace it by some other law. Some who tried to do this met with ignominious end. Akbar's attempts, for example, to scrap some Islamic provisions and to do away with certain of the Islamic signs, were thwarted by some of his own Muslim noblemen on the behest of Sheikh Abdul Haq Mohaddis Dehlvi and toher Muslim *Ulema*.

**Consequences of Political and Intellectual Subjugation**

Formal scrapping of the provisions of the Islamic law commenced with political and intellectual domination by the Western peoples. A little after the establishment of the British rule in India, civil and criminal Islamic law was enforced in the country till 1790. Afterwards the British regime, to consolidate its own power and to liquidate the Muslim identity of the Millat, gradually started scrapping and replacing the provisions of the Islamic law by those of its own laws. By the middle of the nineteenth century almost the whole *Shariah* was scrapped, leaving behind only the Muslim Personal Law concerning marriage, divorce, dower, inheritance and endowment. Later

the same was adopted as Shariah Act and made part of the Indian statute.

Hatred and aversion of sensitive and religious Muslims towards the British regime in India, and their constant endeavour to overthrow it owed itself to their awareness that it was the regime that had got the Islamic Law abrogated and had brought all the affairs of the Muslims under the jurisdiction of the common courts, which had converted India from *Darul Islam* to *Darul Harab*. It was their duty, they felt, to reconvert it into Darul Islam. This also explains why the religious groups of Muslims were constantly at loggerheads with the Britishers. How some of the disciples of Syed Ahmad Shaheed, the *Ulema* of Sadiqpur, started a Muslim movement opposing the British regime, for which they made tremendous sacrifices, is well known. One of the motivating factors in the 1857 war of independence was the feeling of the Hindus and Muslims alike that their religion was being corrupted. Maulana Fazle-Haq Khairabadi and other men of learning passed verdicts against the British government only because it had suspended the enforcement of the Islamic law. Majority of the Muslims who took part in the Independence movement under the *Ulema* did so with the hope that after getting rid of the Britishers, the traditional enemy of Islam and the Muslims, part or whole of the Islamic system would be restored. At least up to the stage of the Khilafat Movement people had no doubt about it. The writing and speeches of this period of Hazrat Sheikhul Hind, Maulana Mohammad Ali and Maulana Abul Kalam Azad as also the exhortations for the boycott of the British Law-courts and the legislative assemblies reveal the true nature of the enmity that the Muslims had against the Britishers. It was not so much the deprivation of the political rights or economic exploitation as the corruption of their religion and culture and the scraping of the Islamic laws by the British regime, that roused the Muslim anger. They offered sacrifices for the cause of independence so that those Islamic laws might be restore,

and they could lead their life according to their religion, culture and tradition.

The same process of politico-intellectual domination followed by the scrapping and replacement of the Islamic laws, was repeated in other Muslim countries, so that even in those countries what remained of the Islamic law was only the Personal law. Afghanistan, Saudi Arabia and Nigeria etc. are exceptions to this. Turkey went a step further and under Ata Turk's dictatorship proclaimed itself a secular state, making changes even in laws relating to marriage, divorce and inheritance.

Changes introduced in the Muslim countries were the result of the politico-intellectual domination of the West. These changes never received the approbation of the religious sections and of the Islam loving people in general. They opposed and resisted all such scrapping of the Islamic laws. This has resulted in internal conflict and dissension in all these countries-a state of affairs that still obtains there. Secular principles and constitutions are being imposed upon the people with the help of military or political dictatorship in these countries, where people loyal to Islam are resisting the imposition, even at the cost of their life. Among the Arabs the main arena of the conflict lies in Egypt and Syria. Among the non-Arab countries the conflict is intense in Turkey. Thank God that the sacrifices of Adnan Mendres and his colleagues have borne fruit in the form of the restoration of Islam in Turkey is place of Westernism under the present leadership which is more religious minded.

Being the result of a servile attitude of mind of the Westernised Muslims, the changes in the Personal Law or even the abrogation of the whole code of Islamic Law in the Muslim countries cannot be deemed as precedent or quoted as authority. What to say of the kings of yore, or the rulers and dictatorships of the present, the whole Muslim Fraternity of the world is not competent to scrap even a single law of Islam.

God the giver of these laws is the only authority competent to do so; but by putting a seal on the sending of Prophets, He has lent to the Islamic Law the quality of immutability. The part, however, of the Islamic, which is the outcome of the derivation and interpretation of the *Mujtahid*, can be subjected to review.

## Designs for Scrapping the Muslim Personal Law in Free India

Political freedom is needed by a nation to fashion its life in accordance with its own principles, ideology, culture and traditions. Greatest incentive was provided to Muslim to struggle for freedom by their aspirations to see the Islamic Law, that had been forcibly scrapped by the Britishers, restored. They dreamt of not only following, in free India, their own Personal Law but also Islamic Laws relating to other matters as well. But the new constitution of India, adopted on 25 January 1950, informed the Muslims that they would be deprived of even the restricted opportunity of following their Personal Law when Uniform Civil Code had been framed for the country. Section 44 of the Directive Principles of State policy reads.

'The state shall Endeavour to secure for the citizens a uniform civil code throughout the territory of India.'

It is sometimes argued that any effort to scrap the Muslim Personal Law shall contravene the provisions of the fundamental rights enlisted in the Constitution, and therefore the Government cannot enact any such law: and that if and when it does, the law shall be deemed unconstitutional. But this notion, I think, is based on a not very thorough reading and understanding of the related provisions in the Constitution. The clause providing Freedom of religion under the fundamental rights reads:

1. Subject to public Order, morality and health and to other provisions of this part, all persons are equally

entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

2. Nothing in this article shall affect the operation of any existing law or prevent the state from making any law.

(a) Regulating or restricting any economic, financial, or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform, or the throwing open of Hindu religious institutions of a public character to all classes and section of Hindus.

This section dealing with the freedom of religion is explicit. Freedom of religion is neither unlimited nor unconditional. The section clearly states that the state can interfere in religious matters if moral, economic or political considerations so demand. The state can legislate fro effecting social reform or to ensure social justice, even if such legislation affected religion.

This section of the Constitution enables the state to intervene in religious matters under various considerations; and the directive principle asks the state to strive to enact a uniform civil code for all the citizens of the country. The doubts regarding the conflicting nature of the provisions from freedom of religion and the directive principle with regard to a uniform civil code as well as objections regarding the constitutionality of the envisaged scrapping of the Muslim Personal Law had all been raised and removed during the debates in the Constituent Assembly. It was then settled that the Muslim Personal Law not to be retained. It is to be noted that the following amendment was moved by Mr. Nazeeruddin, a Muslim member of the Constituent Assembly to the clause dealing uniform civil code.

"Personal law shall not be changed unless consented to by the community by such means as decided by the Union legislature." (Constituents Assembly debates Vol. IX)

This and several other amendment of similar nature were moved and rejected at that time. No room seems now to be left for any further theoretical discussion of the matters After the adoption of the Constitution, special marriage Act (that affected both the Muslim and Hindu Personal Laws) and Hindu marriage Act (affecting the Hindu Personal Law) were passed.

Later Hindu Code Bill replaced the Hindu Personal Law. In the near future this Hindu Code Bill may be applied on all citizens of the country. At the time when the Hindu Personal Law was being changed the Law Minister Mr. Pataskar in radio talk, referred to the opposition as an emotional outburst and argued that the first step towards consolidating the large Indian society through a uniform civil code consisted in codifying and modernizing the law governing the Hindus who formed about fifty percent of the India populace (25.8.1955).

In these very days the Central Law minister was more candid in a press conference where he stated that the reforms being initiated in Hindu Personal Laws would be made applicable to the remaining sections of the Indian Community in the near future, and that there was little likelihood of any difficulty in this respect if the government succeeded in changing the law applicable to about half the population.

This is the real constitutional position. Besides, all the political parties of the country, except the Muslim League, agree with the Congress on this issue. Moreover we do not know any non-Muslim who understands the position of the Millat on the issue and who is ready to accept it.

**Motives behind the proposed change in the Muslim Personal Law**

There are only two real and significant objectives behind the proposed change in the Muslim Personal Law.

1. Some Indian political parties hold the view that India belongs to the Hindus and that Indian culture is essentially Hindu culture. To them the nation's welfare lies in all its people conforming to Hindu nationalism, Hindu culture, Hindu customs, traditions and heroes. This is the least that they expect, from the Muslims and Christians, whom they would like to see back in the Hindu fold which they earlier left under certain compulsion which were no longer there. These political partied may not have any wide influence in the country, but the new generation is rapidly imbibing the influence of their ideas. And there is no political party in the country whose rank and file is totally immune to the influence of these ideas. Obviously those who hold this view cannot tolerate Islam, the Muslim Personal Law and the separate identity of the Muslims. Yet there is no need for despair. We should contact and tell all such people that this attitude will harm the cause of their own religion, and culture, as it will lead to an intense reaction among the followers of other religions, causing more discord and disunity in the country. They have also to be told that come what may, a Muslim can never severe his relation with Islam.
2. There are some others who believe in Indian nationalism instead of Hindu nationalism, and in Indian culture instead of Hindu culture. In their opinion Hindus, Muslims, Sikhs, Christians and all other sects and communities constitute the Indian nation, to strengthen which they would like the religious and cultural distinctions to be minimized as

far as possible till a composite religion and culture could be evolved. They call themselves secular and their view point as secularism. They naturally consider the existence of separate Personal Laws based on religion as detrimental to growth of the composite nationalism. They are therefore not agreeable to the maintenance of the separate identity of the *Muslim Millat,* Separate Personal Laws, separate culture and even script not only, according to them, endanger national unity but also undermine the interests of the minorities themselves. To them it is the Muslim separatism that promotes communalism and causes communal riots. Their desire for uniform civil law, obliteration of religious distinctions, joint celebration of festivals, inter-communal marriages making all people flow in the mainstream of national life, is dictated by national interests as well as by concern for the welfare and security of the Muslims.

That Akbar and Guru Nanak failed in this mission needs to be stressed before such people. Undoubtedly Indians are a nation, but this nation is constituted of peoples with various religions, cultures, customs and traditions. The country's interest does not lie in steamrolling all these differences into one uniform religious and cultural pattern; rather it lies in allowing the full blossoming of the religion and culture of every section of the society so that it feels that it is truly free and enjoys equal rights.

## Minor changes in Muslim Personal Law

From among the Muslims themselves we occasionally hear the voices that are raised in favour of review and change in the Personal Law. Let us examine and understand them.

There is a section among Muslims, which is enamoured of the Western ideas and institutions and is completely unaware

of the complexes and the bitterness among the peoples of the West that these ideas and institutions have produced. This section wants the Muslim Personal Law to be completely done away with; but instead of directly doing so it attacks the provisions of this Islamic law one by one. Their place, in fact, is not within the Muslim community but outside its fold. They have no right to interfere in the Muslim affair. Another section holds the Personal Law responsible for things that are the outcome of the lack of integrity of character. It hopes to effect an improvement in the direction by suggesting alterations and additions in the Law. Although this section has a genuine concern for the Muslim welfare, it forgets that the Law cannot fill the void created by characterlessness. The latter will be better removed not by any recourse to more and more changes in the law, which undisciplined and Godless people will in any case find enough excuse and opportunity to violate, but by an exhortation to them to fear and obey God.

There is a third section among the Muslims that holds the Personal Law responsible for some of the complexes and distortions which are the outcome of the operation of these Islamic laws amidst and un-Islamic system of government, an un-Islamic system of the law courts and amidst the diversity of the un-Islamic law. In fact these distortions can only be removed by the establishment of a just Islamic order. In the transition period it should be our endeavour to safeguard the Muslim Personal Law, and also to ensure that cases relating to the Muslim Personal Law are referred to Qazis or Muslim judges who are well versed in Islam.

It is the considered view of another section that some of these personal laws need to be amended. In its view it is better, in the changed circumstances, to revise the laws than to insist on their continuance. We are not totally opposed to all changes; rather we would very much like the necessary changes to be made. But the scope and the method of any such change needs to be determined.

**The Scope and Method of Change**

This has already been pointed out that we are not competent to change or amend any of the explicit provisions of the Quran and the established practice of the Prophet. As Muslims we are bound to have faith in them and to sincerely follow them. We cannot also change what has been decided by the *Ijma* of the *Ulemah.* We are also not free to interpret the verses of the Quran and the traditions of the Prophet which run counter to the unanimous interpretation of our predecessors. Within the limits prescribed by these we are free to revise and change all such laws that come under.

Leaving aside the Shia Schooll, of which I have little knowledge, I would like to suggest here some guidelines for proposed changes in the Sunni Schools of jurisprudence.

1. A list should be prepared enumerating all such laws which give rise to complications and difficulties and which call for solution.

2. If any one of the laws enlisted above are explicitly provided in the Quran and Sunnah, it should be presumed that the difficulties and complications arise only because of lack of proper compliance, or that the society needs to be morally toned up. The possibility may however be considered of subjecting these provisions to certain conditions and limitations if they did not go against the spirit of the Quran and Sunnah.

3. Normally one should not go beyond the four traditional schools in matters concerning *Ijtihad*, but these are not to be treated as the final limit. If need be, decisions can be taken even against the unanimous verdict of these four schools, provided there is some precedence among our predecessors supporting the position taken. Scholars like Imam Ibn-e-Taimiya, Imam Ibne-e-Qaiyyam and Shah Waliullah may provide as guidance

in this direction. One such issue that I have in mind that practice of divorcing three times in one breath.

4. In most of the Muslim countries the Hanafi School has been prevalent and has served as the complete source of law. Majority of the Sunni Muslims in India also relies on the Hanafi School, which therefore should not be by passed without any valid reasons. In this regard we should act upon the advice of Shah Waliullah, that is, of the many opinions and verdicts we should prefer that which is more in tune with the spirit of the Quran and Sunnah and which may solve problems with more satisfaction.

To shoulder this responsibility one must have the following qualifications:

(a) A Thorough knowledge of the Quran and Sunnah, the *Ijma* (Consensus)and the traditional schools of jurisprudence.

(b) Ability to infer results.

(c) Awareness of the times and of the complexities of the issues.

(d) Knowledge of the Law code, at least of his own school, and of their system of administration of justice.

I may be excused for frankly saying that I know of no one at least in this country who combines all these qualities in his person. The need of the hour, therefore, is to constitute a Committee consisting of *Ulema* representing various Muslim sects and organizations and Muslim jurists. This Committee be entrusted with the task of preparing a draft, leading eventually to the final drafting after a free and full discussion over it.

From the Islamic point of view this draft will assume the status of law code for Muslims to abide by. Yet because of the dispensation of things in the country which requires every such

code to get the sanction of the Parliament before it can be enforced by the law courts, it will have be referred to the Parliament. The effort will have to the made to get the finalized draft passed without any amendments. But if any amendments is deemed necessary it should be referred back to the aforesaid Committee of Muslim *Ulema* and jurists.

I cannot answer the question as to how to do it or as to what extent one can hope to succeed. It is however my faith that God will bless our efforts to solve our problems if we sincerely obey Him and if we resolve to unite in propagating and establishing His cause.

*(Translated from Urdu by Iqbal A. Ansari)*

# CAN WE ABOLISH MUSLIM PERSONAL LAW?

Syed Asim Ali Subzwari

*Advocate, Meerut*

Before examining the different aspects of the problem, let us consider as to what is meant by the term 'Personal Law' and how this term gained currency. For knowing that we shall have to look back in the pre-British and thereafter pre-Independence period of our country.

The term Personal Law obviously means the law which a particular person is bound to observe according to the tenets of religion he professes. What does this term actually mean and how was it introduced in India may better be understood with reference to different periods of Indian History. Prior to the British regime, the Muslims were governed by the law of Islam and the non-Muslims by the law of their respective religions. When the Britishers assumed the reigns of this country, they had got their own system of law, but more than 99% of the people they were to rule follow three main religions of this country viz. Hinduism, Islam and Buddhism.[1] Followers of these religions had their own law which was based upon their religion. Thus, according to Sir Wilson, the classes to whom alone a general code of family law could be applicable were numerically so insignificant that the completion of such a code might seem at first sight to be one of the least pressing duties of the Government. The Government left their subjects free in

[1] Anglo-Mohammdan Law by Wilsom 1821 Ed. P. I

observing the law of their religion in so far it did not affect the rights of other citizens following a different faith. The policies of Britishers did not allow them to legislate on subjects which did not involve participation of persons following different faiths. From the very beginning, the policy they had adopted, as would be seen from section 27 or Regulation II of 1772, was that "in all suits regarding inheritance, succession, marriage and caste and other religious usages or institutions, the law of Qor-an with respect to Mohammadens, and those of the Shastras with respect to Gentoos (Hindoos), shall invariably be adhered to." For cases for which no specific direction was given, the rule of law-as would be seen by another Regulation of July 1781-was laid down as under:

> "In all cases of which no specific directions are hereby given, the Judges do act according to justice, equity and good conscience."

This rule was again enacted in Sections 15 of Regulation IV of 1793 like this.

> "In suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Mohammadens Law with respect to Hindus are to be considered as a general rule by which the judges are to form their decision".

For rest of the cases the rule stated earlier was reproduced in Sections 21 of the Regulation III of 1793.

The basis of these principles seem to be the same policy of the Britishers which was later declared in the Royal Declaration of 1st November, 1858 by Queen Victoria:

> "And we do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief of Worship of any of Our subjects, on pain of Our highest Displeasure."

After the take-over of the administration of our country by the British Government, the Britishers gradually introduced law in the sphere of punishment of crime, procedure of both civil and criminal matters, revenue and land tenures, and transfer of property, according to their own notions. In these spheres even, due respect was shown for some of the provision of Muslim Law. For example, the right of a Muslim was duly respected while drafting the wordings of Section 494 I. P. C. and provisions of Hiba were duly respected while drafting transfer of property Act. With this deviation the above said two guiding principles, after various, were enacted in section 24 of 1871 and again it was substituted by Section 37 of Act XII of 1887 in the following words.

**"Section 37, certain decisions to be according to Personal Law:**

i) Where, in any suit or other proceedings it is necessary for a civil court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mohammaden Law in cases where the parties are Mohammadens... shall form the rule of decision except in so far as such law has, by legislative enactment been altered and abolished.

ii) In cases not provided for by sub-Section (i) or by any other law for the time being in force, the civil courts shall act according to justice, equity and good conscience."

These provisions are still alive, and though section 6 of Muslim Shariat Act (Act XXVI of 1937) repealed Section 37 of Act XII of 1887, for the time being, but in 1943 item (iii) of Section 6, by which Section 37 of Act XII of 1887 was repealed, was omitted and the provisions of Section 37 of 1887 Act were restored.

It would thus be appreciated that the term 'Personal Law' was introduced in the enactments of the Central Government in British regime for denoting certain laws which had their scope of authority round about the family relations and status, religious usages and institutions, and disposition of property by Hiba, Will and Waqf.

To be more specific let us see, as to what is meant by the term 'Muslim Personal Law' and what has been its position in British period.

Section 2 of Shariat Act of 1937 for the first time used the term Muslim Personal Law as a Synonym to SHARIAT. It reads like this:

> "2. Notwithstanding any custom or usage to the contrary, in all question (save questions relating to agricultural land) regarding intestate succession, special property of females including personal property, property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubarat, maintenance, dowry, guardianship, gifts, trusts and trust properties, and waqfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where parties are Muslims, shall be the Muslim Personal Law (SHARIAT)"

To sum up the position of Muslim Personal Law in British India, in the words of Justice Abdul Raheem,[1] was like this:

> "in the early days of the British Settlement the Muhammaden Code was enforced in all of its departments, but in the course of time Mohammaden Law relating to the crimes and punishment, revenue, land tenure, procedure

[1] The principles of Mohammadan Jurisprudence 1911 Ed. P. 37

> evidence, and partly transfer of property have been gradually abandoned and replaced by the enactments of the legislature. Questions relating to family relations and status, namely, marriage, divorce, maintenance and guardianship of minors, succession and inheritance, religious usages and institutions and disposition of property by Hiba, Will and Waqf, still governed by Mohammaden Law, so far as the Mohammadens are concerned, and in some parts of India the Mohammaden Law of pre-emption, is also recognized."

Here it will be noted that it was not at all incumbent upon the British Rulers of this country to respect the provisions of Muslim Law, in the least, and to keep them alive and enforceable, during their regime, and specially from 1857 to 1947. It may be due to the magnanimity of their character, or their pre-occupation with other important problems of their administration in this country, that simultaneously with assuming reigns of administration they did not legislate according to their own notions of law, a uniform code for their entire subjects in this country, but kept the provision of Shariat alive for the settlement of matters, although in limited scope, in between woe Muslims.

But with the achievement of freedom, the position became radically different. All the fighters of freedom-may they be Muslims or Non-Muslims-had fought the battle with a view that in free India, they themselves will be the master of their destiny and will be free to lead a life of their choice. Although every individual had no opportunity to participate in the formation of Fundamental Law i. e. CONSTITUTION OF INDIA yet it can be said that the framers of the Constitution, who were framing it for "The people of India" who had "solemnly resolved-to secure to all its citizens- liberty of thought, expression, belief, faith and worship" kept it in their mind that all different sections of the citizens of this country should be accorded equal opportunity to practice their religion,

and "We the people of India" while giving to ourselves this Constitution did guarantee that every one of us shall have equal right to freely practice and propagate his religion. Thus we are doubly bound to retain Muslim Personal Law if the Muslims themselves want to retain it. One is our moral obligation, and the other is legal, as embodied in art. 25 of the Constitution which says.

> "25 (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."

Since this Constitution is a mutual agreement, for how to live together, in between different people or rather different sections of people of India, and its framers were expected to represent and safeguard notion of religion of different sections of people of India, the meaning of different provisions of the Constitution should be ascertained with reference to notions of religions of the different constituent sections, themselves. If Muslims of India have consented in the principle of freedom to practice religion, it should be ascertained or understand by "free practice of religion" as embodied in the Constitution. Any interpretation of the term 'free practice of religion' which may, now, be put by others and which may be foreign to their notion of practice of religion should not and shall not be binding upon them.

Moreover, if notions of one particular constituent of Indian society may be forced upon a different section of people, the very basis of Fundamental Mutual Agreement To live together i. e. CONSTITUTION OF INDIA will be shattered and the claim of the constitution that WE THE PEOPLE OF INDIA ...DO HEREBY ...GIVE TO OURSELVES THIS CONSTITUTION" will no more remain true.

Now before ascertaining as to what is the notion of Muslims about their right to freely practice religion, let us have

a gradual approach. We shall, thus, first consider as to (i) what is religion, then we shall consider (ii) what is Islamic religion, then we shall ascertain as to (iii) what is practice of religion, then we shall consider (iv) what is practice of Islamic religion and finally we shall see (v) what is free practice of Islamic religion. This last heading will be considered both, from the view point of Islam and from the view point put forward by others-including courts of India.

**1. What is Religion?**

Our Constitution does not define religion, although in Art. 25 it guarantees 'a free practice' of it. It may be stated that the term religion cannot be defined in its abstract form. We cannot define it unless we qualify it with reference to a particular religion, for the fundamentals of our particular religion may not essentially be present in another religion, however well established it may be. But since this term appears in our Constitution, we shall have to resort to the interpretation put upon it by our Supreme Court. In the sphere of law this term has been defined differently by American and Australian Courts. The American view, which has been embodied in Davies *vs.* Biason, (1890-133 U. S, P. 333 at page 342).

> "The term religion has reference to one's views of his relation to his Creator and the obligations they impose of Reverence for His Being and character and of obedience to His will. It is also confounded with CULTS or form of Worship of a particular sect, but is distinguishable from the law".

This view was not approved of by our own Supreme Court while deciding 'The Commissioner Hindoo Religious Endowments Madras *vs.* Lakshmi Mundra Thirtha Swamiar of Sherur Math 1954 S. C. P. 282, but the other view, as expressed by Latham Chief Justice of the Australian High Court, was upheld. This view is as under.

> "It is sometimes suggested in discussion on the subject of freedom of religion that, though the Civil Government should not interfere with religious opinion, it nevertheless may deal as it pleases with any act which are done in pursuance of religious belief without infringing the principles of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. This Section refers in express terms to the exercise of religion. Thus the Section refers in express terms to the *exercise of religion.* Thus the Section goes far beyond protecting liberty of opinion. *It protects also act done in pursuance of religious belief as part of religion*".

Approving of this Australian view, our Supreme Court, while defining the word 'religion' and laying down meaning thereof, said in this ruling at page 290.

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or any intelligent first cause. A religion undoubtedly has its basis in a system of beliefs or doctrine which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and *these forms and observances might extend to the matter of food and dress.*"

This important ruling also held, at para 18 of this judgment, (which occurs at page 290 of the AIR 1954 S. C.) as follows:

> "The guarantee under our constitution not only protects the freedom of religious opinion, but it *protects also acts done in pursuance of a religion and* this is made clear by the use of the expression "practice of religion" in Art. 25"

Another important principle which was laid down by this ruling at Para 19 of the judgment was:

> "What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrine of that religion itself."

Yet another important point of principle was decided in this ruling at Para 22. It was held:

"Under Art. 26 (b), therefore, *a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters".*

Thus, subject to the restriction which this Article imposes every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. *The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief,* is as state above, subject to state regulations imposed to secure order, public, health and morals of the people".

This principle was again quoted with approval in AIR 1958 Supreme Court page 731 at page 739 Col. 2.

It will be in the fitness of things to mention that again in 1958 S. C. 255 Venkataramana Devaru v.s. State of Mysore, the expression "matter of religion" was explained in these words.

> "The expression "matter of religion" in Art.26 (b) embrace not merely matters of doctrine and belief pertaining to the religion but also the practice of it..."

This view was again confirmed in 1959 S. C. 860-Sarup Singh vs. State of Punjab.

Having thus considered the meaning of religion, let us consider as to what is Islamic religion or Islam.

## 2. What is Islamic religion?

The word Islam means 'to surrender one's own self before someone'. This title has been given to the religion because of the fact that the followers of this religion *completely* surrender themselves before the ALMIGHTY. They have no option of their own except to accept the verdict of ALLAH.

Apart from its dictionary meaning, the word ISLAM has been used in the Holy Book at more than one place in this very sense i. e. complete surrender before the Almighty. To quote a few.

A. (Chapter 3 Vr. 83 Translation by Pickthal:[1]) Al-e-Imran. 'Unto Him submiteth who-so-ever is in the heavens and the earth...'

B. (Ch. 4 Vr. 125, An-Nisaa)."Who is better in religion than he who surrenders his purpose to ALLAH..."

[1] Note: Translation of all the verses of the Holy Quran Quoted in this paper are from Glorious Quran by Pickthal, unless explicitly indicated otherwise.

C. (Ch. 5 Vr. 71 Al-Ana-am). "...Say Lo! The guidance of Allah is guidance and we are ordered to surrender to the Lord of the worlds".

D. (Ch. 3 Vr. 52) Tr. The disciples said: We will be Allah's helpers. We believe in Allah, and bear thou witness that we have surrendered (or 'are Muslims') (Unto Him). From these quotations from the Holy Book, it is evident that the word Islam and its derivation like 'ASLAMA', 'MUSLEMOON', 'MUSLEMA' have been used in the sense of complete surrender. Thus the word 'Islam' is not only used in the Arabic language in the sense of complete surrender but the Almighty Himself uses this term and its derivation in the Holy Quran in this very sense. Thus it would not be incorrect to assert that the very spirit of this religion as also its fundamental requirement is a complete surrender on the Part of one who claims to be a Muslim before the dictates of ALMIGHTY.

Now, how and wherefrom are we to know the command of Allah whom a Muslim has acknowledged his exclusive Master?

This command can be known and has ever been known through the mediation of Messengers. Almighty has been sending His Messengers from the very day man was commissioned to set his foot on this earth. Before he was so commanded the first decree which was issued was:

Surah II vese 38: We said: "Go down all of you, from hence; but verily there cometh unto you from me a guidance; and whoso followeth My guidance, there shall no fear comeupon them neither shall they grieve."

This chain of messengers ended on Hazrat Mohammad (Sallal-Laho-alehe-wa-sallam). A number of these messengers were given Books according to which they were to inform the people of the command of Almighty. Those who were not

given books were to guide the people according to the commands embodying in the last preceding Book. Last of such books is ALQUR-AAN. It was revealed upon last of the messengers.

It may also be noted that all the messengers who were sent to this planet were not only carriers of these Books but were also demonstrators of the orders contained in the Books revealed upon them. They themselves, first, practiced those directions before calling upon others to so practice.

It is also to be noted that the latter command ever repealed the earlier. Thus the Final command-which is to enjoy supremacy till the last day-this world is to observe, is ALQUR-AAN, and its final interpreter is Hazrat Mohammad Mustafa (Sallal-Laho-Alehe-wa-Sallam).

In this perspective if anyone wants to be a Muslim he can very easily resort to the well preserved contents of the last of Holy Book-Alqur-an and for knowing the interpretation of the verses of the Book or for knowing the details of the way of life one is to adopt in the various aspects of life and specially so for aspects which are not specifically noticed in the Holy Book one is resort to the life of the Holy Prophet, which too is so nicely preserved that no better account of any other life in the world has been so preserved.

For knowing that the contents of the Holy Book are well preserved and the reported interpretation given by the Holy Prophet is authentic, the details of the life of Hazrat Mohammad are fully and truly kept. We shall have to look rather in detail as to how it happened.

Since it is the messenger of Allah who has come to us with a message, we are to know of the Commands of Allah through him, and we have to understand the message through his interpretation.

This interpretation was both oral as also practical. It was given by the Rasool (Sallam) by his word of mouth and by his

deeds. The words and deeds were fully controlled by the Almighty as is known from the Ayat:

(Chapter LIII Vr. 3 and 4 Annajm)

Nor doth he speak of (his own) desire. It is naught save an inspiration that is inspired. And another Ayat in Surah ALJIN: Ch. LXXII Vr. 26-27. Which speaks of the protection which is accorded to all the Messengers generally:

> "(He is) the knower of the Unseen, and He revealeth unto none His secret,
>
> Save unto every messenger whom He hath chosen, and then He maketh a guard to go before him and a guard behind him."

Since the Sender of the messenger knew it full well that the deeds of the messenger are completely controlled and safeguarded by Him, He Commanded us a number of times that we have to follow His messenger's word and action. This direction is contained in the following, among other injunctions:

A. (Ch. 59 Alhashr Vr. 7) "...and whatsoever the messenger giveth you take it. And whatsoever he forbiddeth, abstain (from it) And keep your duty to Allah: Allah is stern in reprisal."

B. (Ch. 33 AL AHZAAB Vr. 21) "...Verily in the messenger of Allah ye had a good example for him who looketh unto Allah and the Last day and remembereth Allah much".

C. (Ch. 24 ANNOOR Vr. 54) "Say: Obey Allah and obey the messenger".

At so many other places this obedience to Allah and also to Rasool was commanded to the believers.

As a matter of fact we obey the prophet (peace be on him) because we have been asked to do so. Thus obedience to the

prophet is nothing but an obedience to the commandment of the Almighty. In other words, obedience to Prophet is nothing short of obedience to Allah. The Book itself bears testimony to this conclusion.

(Ch. 4 ANNISA Vr. 80) "Who so obeyeth Allah"

Thus the position of act and deeds of Holy Prophet i. e. Ahadees with reference to Commands of God i. e. Aayate Quraani is the same, as the position of Rules framed by a Government under the directions of an Act is with reference to an Act passed by the Legislature.

It is obvious that if all the Commandments for the guidance of the mankind were codified by Almighty the Book might have been unwieldy. Thus side by side a book of about 900 pages a demonstrator was also given to us who not only told us the meaning of the Book, but himself practiced what he asked his followers to practice and thus practically guided them through different spheres of life. This guidance has showed us a path as to how have we to act in days of peace and war, in joy and sorrow, in family atmosphere and in gatherings of strangers, and while in contact with friends or enemies entering into a contract with other, etc. Hardly, there would be a situation for which guidance is not available in the life of this demonstrator, Hazrat Mohammad Mustafa (Sallaam). This guidance is now complete for all times to come. This is not my own conclusion but the Book itself testifies to it.

It is important to note that when the text of the Book was rendered complete, it was a stage when the mission of the Demonstrator (peace be on him) had also become complete. Thus, in the end a very important certificate was endorsed certifying that.

> (Ch. 5 V. 3 ALMAEDAH) "This day I have perfected your religion for you and completed My favour unto you, and has chosen for you as religion Al-ISLAM.

In this way it was declared that all the aspects of the obedience of man to his Creator had been completed and whosoever wanted to obey God in any walk of life, he could do so in the light of the verses of the Book or the guidance shown by the holy Demonstrator.

Thus Islamic religion is nothing but to obey the commandment-whether positive or negative-of the Qur-aan-e-Kareem or the Holy Prophet (Sallallaho alaihe Wasallam).

Since this religion is to survive till the Day of Judgment, it was in the fitness of things that arrangements were made so that the Book and record of the life of the Demonstrator were completely preserved.[1]

---

[1] The arrangements in which the Text of the Holy Quraan and AHADEES were preserved need special consideration. The arrangements have conferred singular distinction upon Quraan-e-Kareem and books of Ahadees. They may be narrated as follows:-

(a) Of all the Heavenly Books it is only Quraan-e-Kareem of which the responsibility to preserve has been assumed by the Almighty. This surety has been provided in the verse:-
Ch. XV Vr. 9 ALHIJR: Translation: Lo! We, even We reveal the Reminder and Lo! We verily are its guardian."

It was so for the fulfillment of this promise that the Creator of memory made it so easy for this faculty of man that those who wish to preserve this Book in their memory, find it feasible to do so, while they may not be able to so preserve a single line of any other book of prose.

As a matter of fact it is not the credit of a man to remember the verses of this Book by heart, but it is the credit of this book that it is preserved in one's memory. It may not be out of place to observe that today none of these who claim themselves to be Chaturvedies, or Trivedies or Divedies, are able to recite, from memory, any of the Vedas, they or their ancestors claimed to have remembered by heart, once, while it seldom ooccurs that in any gathering of Muslims of today there may not be one or more Hafiz-e-Quraan.

2. Not only the Almighty has taken it upon Himself to preserve the letter of this book, but He has also taken it upon Himself to let us know the Correct meaning of its verses:

Ch, LXV-Vr. 16 to 19 ALQAYAMA:

"Stir not thy tongue herewith to hasten it. Upon us resteth the putting together thereof and the reading thereof. As we read it, follow from the reading. Then, Lo! Upon US (resteth) the explanation thereof."

3. Not only a Book was given to us but the last Messenger of God was also sent to this earth to explain true meanings of the verses of this book and to practically demonstrate as to how a Man can lead a life according to the Wish of the Alimighty in the light of the injunctions of the Holy Book.

4. To redeem this promise Almighty created an inclination and developed a fine taste in Hazraat-e-Sahaba (the comrades) of the Prophet (peace be on him) to keep them fully aware of all the doings of Hazrat Mohammad Mustafa (Sallallaho alaih-e-wasallam). If one Sahaabee could not find it feasible, as others did, to be present, all the 24 hours at the threshold of the Holy Prophet he had arranged with others to be present on the alternate days, and to learn fully well of all the doings and sayings of the Holy Prophet for the day he was absent, from his companion. Thus through these, Hazrat-e-Sahaba, the doings and sayings of the Holy Prophet were available to those who came afterwards. As a matter of fact it had to become a custom of the day that the Sahaba used to regularly narrate the sayings and doings of the Holy Prophet, and a reciprocal taste was created and developed in those who came afterwards, to learn of these sayings and doings and to pass them on to their followers.

5. It is no doubt true that taking advantage of this order of the day, the Jews and Munafiqs in the garb of Muslims, fabricated innumerable AHADEES with a view to polute this source of inspiration to Muslims. But History bears testimony that Almighty fulfilled His promise of SUMMA INNA ALAINA BAYANAH by creating such personalities like Imam Bukhari, Imam Tirmizi, Imam Muslim and Imam Malik who were bestowed with such marvelous and rare qualities of memory, discerning chaff from the husk, devotion to the cause of compiling the sayings and record of the deeds of Hazrat Mustafa (Sallallaho alaihe wasallam), devising the principle to scrutinize the reports of the sayings and deeds attributed to the Holy Prophet, collecting full knowledge about the life of those through whom a report-under-scrutiny was received. Thus a new criterion and standard was devised to ascertain the truth or otherwise of a report attributed to the Holy Prophet. Lack of space and time does not permit me to deal with this aspect in detail but for the present it may suffice to state that if during the entire life of a particular narrator-who is only one out of Several it was proved that he had only once in his life mis-state or misrepresented or about his memory or in a particular stage of his life any reasonable doubt, about the soundness of his memory-could be entertained and the report is attributed to him in that stage of life, or about his power appreciating facts or about his general demeanor in life the slightest doubt was created or about his devotion to prayers or about his dress and facial apprearance any unfavourable report was there then his authenticity was discarded, and the report was not considered reliable. A short story may be related here which will show as to how particular those narrators of Hadees

It may be pointed that the Muslims do not believe in a God who retired to a secluded Chamber, after creating this Universe and man. We believe in Allah who is not only vigilant all the times and through. Who's Attention this entire Universe is pursuing a set course of conduct, but is also the LAW Giver and truly speaking the only LAW GIVER. It has been made very clear in Ch. 17 Surah Yoo-suf, Vr. 40:

'The decision rests with Allah only who Hath Commanded you that ye worship none save He. This is the right religion.'

And in another verse No. 3 in Ch. 7 ALAARAF:

---

were about the fitness of their own faculties to narrate. A Narrator of Hadees had become blind in his old age. He had travelled the path from his town to Mecca in his early life. He had to traverse it again in the days of blindness. He was riding a camel. At one place he, all of a sudden, bowed low. He was asked the reason of his so doing, and told that he bowed because of a palm tree, which was so standing in the way that caused hindrance to the riders of camel. It was told to him that there was no such tree. The gentleman asked to stop and refused to proceed on and said that in his early days when he had travelled this path there was such a tree at the spot and declared that enquiries be made and if it is proved that there never existed such a tree at that spot HE WOULD CEASE TO NARRATE A HADEES SINCE THAT DAY ONWARDS AS HE WOULD CONCLUDE THAT HIS MEMORY HAD BECOME WEAK. Similarly about each of the report it was ascertained that through how many sources it was coming and that if the Sanad of the report comprised four narrators it was fully ascertained as to how many of narrators of that particular Hadees have been during the regime of each of the narrators. If for instance, the Hadees was narrated in a particular period by only one of such persons, then this report was not considered to be absolutely reliable. Similarly if any Hadees came down to the Mohaddis through sources however reliable they may be, but it ran counter to the lines of Holy Quraan or any established principles of Islam, even then it was branded as unreliable. Thus lacs and lacs of the lives of the narrators were screened and scrutinized for this purpose, and a regular subject known as ASMA-UR-RIJAL was developed and principles were laid down for scrutinizes evidence !ed in Indian courts in the light of the provisions of the Indian Evidence Act-an Act which is considered to be one of the best Acts of British regime-can very well appreciate as to what a high degree of authenticity can be attached to reports about the sayings and deeds of the Holy Prophet which have well stood this test.

Now what this HIDAYAT (guidance) is, for which the man was commanded, at the very inception, to obey? This Hidayat is the Book revealed upon the messengers of God from time to time, the final of which guidance was contained in AlQURAAN revealed upon the last messenger, Mohammad (peace be on him). In short, it amounts to this: Obey ALLAH and His Rasool (Sallallaho Alaihe Wasallam) and none else.

The Mohaddisin (reporters) of Islam have after immense labour in scrutinising the reports on the stone of marvelous criteria which they themselves evolved, compiled a set of six books of Ahadees, known as SIHAH SITTA, and the Muslims can really be proud of such a valuable possession. It is through this collection that it can be said with no fear of opposition that the record of the life of no human being- may he be a Monarch or a Commander of yesterday or today-has been so truly and comprehensively preserved as the life of Hazrat Mohammad Mustafa (Sallallaho alaihe wasallam) has been, and is available today. It was merely by the grace of Almighty that the servants of Islam could do so.

Now it may be pointed out that whatever Muslim Personal Law is available today is primarily the law given by Allah or under the orders and strict supervision of Almighty by Hazrat Mohammad (Sallam). Apart from these primary sources of Muslim Law the other two sources namely QYAAS and IJMA do not give or create law. They merely are available for interpretation and application of principles of law given by the earlier two sources, on a new set of circumstances, which may appear later on. In case no specific order is available in the first two sources, the last two sources- Ijma and Qayas,- help us in coming to a problem in the light of the earlier two sources of law. It may specifically and pointedly be mentioned that the part of Muslim law which is today enforced in the courts of law namely Inheritance, Guardianship, Will and Hiba, are primarily based upon Quraan-e-kareem while the law of Waqf and pre-emption are based upon the law given by the Holy Prophet.

None of the law which are enforceable in courts of law of today are the creation of Qyaas or Ijma.

To sum up, Islamic religion is a way of leading life in obedience to Allah and his Rasool in the light of the well-preserved injunctions of the Holy Book and the Ahadees of Prophet (peace be on him).

## (iii) WHAT IS PRACTICE OF RELIGION

It means in the words of our Supreme Court performance of outward acts in pursuance of religious belief.

Here I may remind of a very important misunderstanding about practice of religion. Although, we have been above that the guarantee under our Constitution ...protects acts done in pursuance of a religion, yet when the meaning of the term 'practice of religion' is sought to be defined, a section of people contend that only that act of religion is protected which is a "must" and in which no option is available to the Doer. In other words their contention renders protection only to the "Frayiz" and "Wajibat" and does not protect "Mubahat", "Sunan" and "Nawafil". This section does not count these classes of provisions of religion to be practice of religion as used in Art. 25 (1) of the Constitution.

This view has prevailed even in certain decision of our own Supreme Court. In 1958 S. C. Page 731 – M. H. Qureshi *vs.* State of Bihar it was observed:

> "It is therefore optional for a Muslim to sacrifice a goat for one person or a cow or camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty."

Although it was contended before their Lord-ships of the Supreme Court that from time immemorial the Indian Muslims

have been sacrificing cow and this practice, if not enjoined, is certainly sanctioned by their religion and amounts to practice of religion protected by Act. 25. But since the petitions under consideration then were based upon the contention that the sacrifice of cow was an "essential" and history provided evidence that some of the Muslim Monarchs had prohibited cow slaughter in their days, the contention of 'sanction' was not specifically answered.

Unfortunately the position of SUNNAT in Islam was not at all discussed in that case.

### (iv) WHAT IS PRACTICE OF ISLAMIC RELIGION

Having understood as to what is Islamic religion it is no more difficult to find out as to what its practice means.

In this respect it would be beneficial to quote here an injunction of the Holy Book.

'O' ye who believe come, all of you, into submission (unto Him)...'(II-208)

This translation by Mr. Pickthal at page 51 of Glorious Quraan may be somewhat confusing to readers. Here the words of translation 'all of you' may reflect to the number of those whom this verse is being addressed. As a matter of fact this is not so. The verse really means that one should enter Islam in all of its entirety. This contention would be proved by a note given at pages 160 of Vol. I of Tafheemul Quraan by Maulana Maudoodi. The Roman version of that note is like this.

> "Yani kisi istisna aur tahaffuz ke beghair apni poori zindgi ko Islam ke tahat le aao."
>
> "Tumharey Khayalaat, tumharey nazriyat, tumharey Uloom, tumharey tor tareeq, tumhare muaamlaat aur thumharee sayee wa amal ke rastey sab ke sab bilkul tabaye Islam hon. Aisa na ho ki tum apni zindgi ko mukhtalif hisson men taqseem

karke baaz hisson me Islam ki pairvi karo aur baaz hisson ko is ki pairvi se mustasna karo."

As a matter of fact the injunction to bring every aspect of one's life under the domain of Islam means that every command of the Book-which certainly includes the commands given by the Holy Prophet (peace be on him) under the delegated authority of the Almighty be obeyed. Which means that every part of this Book-individually and collectively be obeyed. The Book has specifically pointed out as to what would be the fate of those who believe which belief is manifest from their practice-in a part of Book and those who do not believe- which non- belief is truly exhibited by their nonpractice- in the other part of this Book. The verse runs as follows- Ch. II Albaqra Vr. 85:

'...believe ye in part of scripture and disbelieve in part thereof; and what is the reward of those who do so save ignominy in the life of the world and on the Day of Resurrection they will be consigned to the most grievous doom. For Allah is not unaware of what ye do.'

The Holy Prophet while explaining the meaning of this verse is reported to have said that those who knowingly disobey an injunction of Quraan are its disbelievers.

Thus the practice of Islamic religion is the practice of the complete code of conduct-provided by the Holy Book and by the record of the life of Hazrat Mohammad (Sallallaho alaihe wasallam).

Thus it may seem peculiar for those who are not conversant with Islamic life. That not only our religion shows us right path in every field of life, but it makes the conduct of a Momin in all these fields by itself and 'IBADAT' (prayer). And in this way we can better understand the meaning of the verse:

(Ch. 51 Cr. 56 - AZZARIYAT)

"I created the Jinn and human kind only that they might worship me".

It is to be appreciated that when this is the avowed aim of the creation of Man and Jinns then guidance should have been provided for them and in fact it has been provided in every walk of life, following which the man may convert each and every act of his life, into Ibadat (prayer). This further supports the view that in whatever circumstances man is placed for the time being, he can practice Islamic religion by acting in a certain fashion.

### (v) WHAT IS FREE PRACTICE OF ISLAMIC RELIGION?

This aspect needs more elaborate discussion. Actions in Islam are divided in three broad categories. They are: (i) Mandatory (ii) Permissible and (iii) Prohibitive. The first class can further be categorized as (a) Farayiz (b) Wajibat (b) Sunnat-e-Muwakkada (a practice for which there is a direction of the Holy Prophet to adopt). The second class can be further classifid as (a) Jaiz or Mubah and (b) Nafil. The third can also be categorized as (a) Mukrooh and (b) Haram.

If we were to accept the curtailed meaning of "practice of religion" as discussed in sub-heading (iii) above, with reference to Islam as well i. e. if we were to accept that only the practice of Farayiz and Wajibat (essential) are protected by Art 25 (1) and not the permissible and prohibitive, then the entire picture of Islamic law and Islamic practice would be defaced.

I here quote certain examples:

(a) To offer daily five times prayer in the Mohalla mosque is not a FARZ or Mandatory. If one offers

this Namaz at his residence, then the Farz will we discharged. But if in view of the general mandate of Quraan that we should rehabilitate Mosques, and under the specific orders given by the Holy Prophet, that people should come to the mosque for offering five time prayer- which is still not a Farz- the State was to withdraw its protection from those, who, with a view to obey the command of the Holy Prophet, go to the mosque for such prayer, by contending that it is not mandatory to go to the mosque for offering such prayer, and as such it is not practice of religion, then need I point out that the existence of the mosques would be jeopardized.

(b) Another example may be provided by the existence of mosques in Mohallas. It is not a must that there should be a mosque in every Mohalla. In this perspective if there is an opposition for the construction by a Muslim in his own place of a mosque, and the custodians of law withdraw their help on the plea that no Muslim has got a guaranteed right to construct a mosque as it is not covered by the practice of religion, then it can be visualized as to what shall be the position of that citizen of India.

(c) Similarly if a person is offering prayer and he is offering Sunnats and obstruction is created in his way and it is justified by the argument that the fellow has no constitutionally guaranteed right to offer Sunnats in the prayer, what an awakward position, the fellow would be placed in.

(d) If a Muslim income taxpayer who defaults in payment of his tax on due date, is asked to pay interest according to the provisions of Income Tax Act, 1961, and he refuse to pay it on the plea that to accept or to pay interest is prohibited in Islam and

then it is argued that only mandatory provisions are protected by Art. 25(1) and not the prohibitive, then we can conceive the miserable plight of the poor fellow.

These illustrations are sufficient to indicate that while attempting to find out the meaning of free practice of Islamic religion, we cannot put a curtailed meaning on the term of practice of religion. The following points need special consideration:

(a) Art 25 (1) does not qualify that only practice of that much portion of a certain religion is guaranteed which is a "Must" When the framers of the Constitution themselves did not put any such restriction. Then how can we be justified in curtailing its meaning and adding a proviso of "Essential parts of" to the word religion as used in that Article.

(b) The article does not only guarantee a practice of religion but it guarantees a free practice of it. If a Muslim acts according to the known practice of the Holy Prophet – May it not be one ordered by the Holy Prophet- in a belief that he is following the Prophet as he has been ordered by the Almighty to do so- he is certainly practicing religion. If any interpretation of Art. 25 (1) arms the State with a right to stop such a practice then it can never be said that the Constitution has guaranteed a FREE PRACTICE OF religion.

(c) It has to be borne in mind that those provisions of Islam which permits a believer to do or not to do an act, have vested this discretion in the Muslim himself. According to Islam it is he who is to exercise this discretion. If someone else places a restriction on him to do in a discretionary matter in a particular way and he

> is compelled to act accordingly then may it be that while acting under that restriction he is practicing one of the two alternatives of a provision of Islam but certainly he will not be *freely practicing it.* He can logically be said to be freely practicing religion only when he is choosing one of the two or many alternatives in a permissible matter *according to his own discretion.*
>
> Thus free practice of Islamic religion is nothing but a free exercise of discretion in permissible provisions of Islamic Law. The only restrictions which the framers of our Constitution intended to impose on this free practice of religion are enumerated in the Article itself and to add any other restriction on practice of Islamic religion will be TANTAMOUNT to deleting the important adjective FREE from the wordings of the Art. 25 (1).

Thus in view of the guarantee of our Constitution the Muslims are free to practice their religion, subject to the restriction of (i) public order (ii) morality (iii) health and other provisions of part III (dealing with Fundamental rights).

None of these restrictions come in the way of the provisions of Muslim Personal Law.

It may be beneficial to note that each of the provisions of Muslim Personal Law which has remained current during the British regime has stood the test of equity, justice and good conscience and not only it has proved its worth by the complete acceptance of Muslims as a safe guide for them but the system has impressed its usefulness on the other personal laws. Who can deny that the provisions of inheritance for ladies, marriage of the widows, inter-caste marriage, divorce amongst the uncompromising couple, disposition of property by will,

acquisition of property by pre-emption, have compelled the non-Muslims of India to adopt them?

Thus after the advent of the Constitution of India not only those provisions of Muslim Personal Law which were current in the courts of India are protected by the guarantee of Art. 25 (1). But other provisions of Islamic law which were substituted by the Britishers in their regime because those foreigners were master of this country and were not obliged to keep any law current in their courts nor any fundamental rights were guaranteed to the Indian Muslims, too, are protected by this guarantee.

Thus not only abolishing the current Muslim Personal law is not feasible under the Constitution, but I am sure that if other provisions of Muslim law which were not kept alive by the Britishers viz. inheritance in Agricultural land and exception for Muslim to pay interest were to be pressed to be made available for practice, the Constitution will not deny them complete protection.

# THE MECHANISM OF CHANGES IN MUSLIM LAW

Mr. M. R. M. Abdul Karim

*Advocate, Supreme Court*

I propose to deal with law in its Comprehensive general aspect.

> "The words used are necessarily general and their full import and true meaning can often be appreciated when considered as the years go on in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of words changes but the changing circumstances illustrate and illuminate the full import of that meaning".

So said Lord Wright in 1936 A.C. 587 at 614 enunciating the rules of interpretation of a Constitution. This principle is conducive to flexibility without deviating from the fundamentals and can be usefully applied to all organic laws. Change is the Law of the Universe, the Law of the planets and the Law of element, and the law of life. Changes in law there may be, there can be and many times there must be. But they must come from within the community and never imposed from outside. They must be approved by an authority recognized by the Community as such and not by individuals.

One of the fundamental defects of the Muslim Community at least in India is the absence of a standing body to review the Muslim Law from time to time, and to watchfully consider the constant and continuing changes willy-nilly overtaking

humanity. Law is the foundation of human society. Muslim community is only one of the Communities in the world. The Law of the Muslim Community has to govern the internal relation of Muslim as well as guide their external relations. As far as their external relations are concerned, our Law can be static only if the law of other Communities is static. Even then our Law need not be static. But Changes for the better or the worse take place in the structure of other Communities. Since the beginning of Islam, the world has undergone mighty changes. Muslim Empire rose and fell. Christendom broke into two main parts Catholic and Protestant. European countries attained supremacy in knowledge and therefore power. Political revolution overtook France. Industrial Revolution pushed England and Western countries, centuries ahead of the East. The elements of Nature were harnessed and controlled for the welfare of man. This in turn led to the economic Revolution of Russia. Slavery was abolished by the West. Slavery of thought was dead. The most marvellous advance was made in the field of Science.

But the Muslim world and Muslim Law simply blinked at the brilliant lustre and breathless speed of the revolution taking place all around them. The only reaction was to draw their heads like snails and tortoises, into their pre-existing shells of readymade thoughts, presumptions of eternal superiority already attained a millennium back and self-imposed ban of any new job for the hearts, eyes and ears created by Allah.

The Muslim Community has to meet the challenges thrown by such changes which range from nominal to the most revolutionary. Not merely that. The Muslim Community can and must try to present a structure of law par excellence. For this it is absolutely necessary to have a standing body of eminent men. One indispensable qualification of the members has to be not only deep learning in Muslim theology but almost encyclopadic knowledge of world history, political science, world economics and finance as well as at least general history of scientific advance. A Law can never be a living force if it is

divorced from the vital world forces hemming in from all sides on humanity. A law has no vitality if remains immured in vacuum flask immune from the waft of fresh air. The prayer enjoined by the Supreme Being on His Khalifa is, "My Lord, increase my knowledge."

Nobody will deny that this is applicable to every walk of life. If there is a subject applicable to every walk of life, it is law. This prayer loses all its meaning if our Law is held to be finally and unalterably determined by a few schools of thought about ten or eleven centuries ago. Increase of knowledge ill suits the concept of finality of thought. The doctrine of finality would have prevented even the successive founding of such several schools. The very fact that several schools arose in the first few centuries of Hijira establishes the dynamic character of Islamic law. The loss of dynamism was a mortal blow on the intellectual powers of the Community. Nobody and no subject can escape the ravages of time. The first and easiest victim of Time is static thought or man or nation. Static being is opposed to the very nature of the Universe or its parts which are every moment speeding with immense velocity. 'In changes of night and day there is a sign for me of wisdom." The Holy Quran stresses the might of Allah by referring to His Creative powers. There is no Creative power in eternal status quo ante. "He (Allah) is in new Glory every moment." All glory to Allah and Al-Quran and the Holy Prophet Muhammad (May peace and blessings of Allah be upon him) that they did not store man with knowledge but filled him with immense capacity for knowledge; that they did not lock the mind with knowledge but unlocked the mind for progressive and continuing a acquisition of knowledge; that Al-Quran ardently champions freedom of thought using both intuitive intellect and empirical knowledge. "It is Allah who gave you ears and eyes and hearts; little do you give thanks." Thus is condemned finality of thought. "Man is made of the best make" for the purpose of advancement every minute of his life. "He is the lowest of the low" when his thinking power ceases to operate idolizing all pre-existing ideas

as dogmas holding them immutable and incapable of any improvement. A lazy mind seems to a holy mind. Decadence of the Community entered through the gateway of finality.

Change is neither a virtue nor a vice by itself. Change does not imply uprooting of the old. But no idea ever remains without change whether one wills or not. Each idea tends to get encrusted with different meanings and various shades in accordance with different men and times, consciously or unconsciously. For example the meaning of our Kalima is not the same for all Muslims. The meaning varies from absolute ignorance to the deepest knowledge according to the individual capacity at a given time. To ordinary layman it is one thing, To Hajlaj another.

The point is this; since difference from time to time, in other words, changes in the ideas are inevitable, there should be a regulating body, a reviewing authority, receptive and responsive, patient and flexible with clear head and cool mind, watching the world, studying the trends, deliberating on and weighing the good and bad of every new idea, and interpretation emanating from any quarter in the world and leading the kindly light for the community and through them the Humanity.

The Holy Prophet's advice to the newly appointed Governor about the necessity of the use of discretion was honoured by observance by the early Muslims. And history was made. The same advice is more honoured in breach and merely worshipped by later Muslims by repetition in platforms and pulpits – See the catastrophic effect on the Muslims.

The Holy Prophet never warped the mind of his followers with indiscriminate finality or un-controlled freedom. He acknowledged the importance of discretion, foresaw the possibility of unforeseen circumstances.

Never did he shut out individual initiative in thought, word or deed. The most practical of all prophets prepared us to face new unexpected situations according to our best discretion.

## IJMA

This discretion is vested in Ijma exercising Ijtihad- the collective wisdom of the Community. This wisdom can have full play only on the acceptance of the principle- that new ideas and concepts may be necessary and desirable under certain circumstances.

Al-Quran is immutable. But what does Al-Quran say Here is the field for the full play of the collective wisdom of the Community. Belief in Allah is unchallengeable. But knowledge of Allah is capable of infinite increase; Changes working in one's mind are inevitable.

It was suicidal for our Community to have shut out the Ijma and Ijtihad of the early Muslims. The whole Muslim world lies prostrate today as the natural consequence when thinking power was choked and smothered to death by bigotry and orthodoxy. "They have minds but meditate not, they have eyes but see not; they have ears but hear not."

This orthodoxy itself is a nomenclature given to an idea by the sequence of time. As a child, it was dubbed heresy. In withering age, it is worshiped as orthodoxy. Old men or old ideas are good if they nourish their offspring. Species perpetuate by reproduction. Ideas dominate by better reproduction assimilation of new concepts. Law can and must, foster its youthful radiance with the spirit of endless research and constant study and free and frank exchange of ideas. Just imagine Arabic literature without absorption of Greek and Latin treasures. Imagine Persian literature without assimilation of Arabic learning and knowledge. And imagine Western Culture and civilization, language and literature without profuse Arabic fertilization. The wheel has turned full circle and it is now our turn to cultivate the voraciousness with which

early Muslims devoured alien knowledge and merged it in their own.

I hope that I have made clear my concept of the nature of change that is necessary for the very existence of any system and without which the system becomes corrupt and diseased. We live from moment to moment by breathing fresh air in. Change of air is necessary for life; air is not abolished but purified. Every system gets new lease of life by injection of new ideas. Old ideas are not thrown out but improved; polished; refined and reshaped. "Changes in the direction-of the Winds-there is a sign for the intelligent." Oceans renew themselves by movement and evaporation. Air space is full of chemical changes. Nothing is at rest except the Muslim Community claiming to be the chosen of God. The Community neither dies nor lives but lingers on unhonoured and unsung, or worse, despised and detested and defeated by much smaller people. We have stood still too long. The caravan has left us long ago. Recent history speaks louder the fate of the Muslim Community than all the words one can write "We did not harm them, they caused harm to themselves" (Al-Quran).

The mechanism for change is the resuscitation of Ijma in all its majestic power and splendor. The people of Ijma must be "Rasikhoona fil Ilm" and "Ulul Albaaab." Al-Quran refes to "Ilm" or knowledge and not some mere pre-existing theological knowledge as wrongly assumed by the Community. "Men firmly rooted in knowledge" and "men of knowledge" cannot but be those equipped with every kind of science, religious, political, economic, social, mathematical, natural and physical sciences. Since one cannot have proficiency in all, lack of theological knowledge should not be a disqualification for membership of the body. Free discussion, full tolerance, fair hearing, fine manners, frank exchange of views are indispensable hall-marks of such a body. Difference of views shall not lead to discord and dissension. "Kafir" Fatwa shall be banned. Excommunication, inquisitions, and persecutions and judicial murders as in the case of Hallaj, John Huse etc had

been the bane of all communities. A journal in English and Urdu is a sine qua non to Ijtihad. Fatwa shall be decided by consensus. The minority shall be bound by it. Membership shall be subject to such a condition. Fatwas shall be revocable by consensus. The Ijma shall have periodical session in different parts of the country at different times.

One most important problem that calls for urgent attention by such as Ijma is banking. One other is insurance. They are inter connected. There cannot be one law for the State and another for individual. State banks are indispensable for a State. There cannot be world economy without Banking. World Finance breathes through Banking. The Ijma alone can guide the individual Muslims and the Muslim community. A positive definite and enlightened guidance will establish the Community among the foremost in the Commercial and industrial world.

Al-Quran enunciates Socialistic principles with a majestic eloquence and simple directness and it is easy to codify economic law out of Kalamullah and Kalam-e-Rasool. If there is any book on Welfare State, welfare of this world and the spiritual world, through and through it is the Holy Quran, Al-Quran and Al-Hadis. The practices of the Holy Prophet and his four caliphs lay down the principle of "to each according to his need and from each according to his capacity and the need can be lowest though capacity can be highest."

The principle of change and improvement can be based on the lives and careers of the great Imams. The Ijma ought to be the symbol of eternal improvement in the law in accordance with the needs of times, interpreting Al-Quran and Al-Hadis in the light of latest discoveries and scientifically established thoughts and principles. Al-Quran shows the royal road to scientific discoveries and inventions and Ijma should give all encouragement, to open new frontiers of knowledge, to explore the hitherto unknown fields and to discover answers for unsolved riddles of the Universe. What a mighty difference

will it make to the community if today a Muslim Scientific expedition goes to Antarctica or scales the unconquered peaks or explores the Atlantic depths. This will not come until and unless the veil of finality is torn away from the face of the Muslim Community. Adventure of ideas alone can give fulfillment of each man's destiny, and it is better late than never, to grasp the spirit of modern age.

The very composition of Ijma must give great impetus to up-to-date education of Muslims all over the world shedding their aversion to science and scientific thoughts and pursuits. Thinking power of Muslim mind should be fully tapped. An appeal by the Ijma for educational advancement will have a magic effect ridding the Community of its doubts and hesitations, and indifference. The reasoning power of Muslims atrophied under dogmatic finalities will get rebirth and rejuvenation converting the moribund Muslim intellect into the vanguard for world intelligentsia. The Ijma can put its seal of approval on the compulsory nature of acquisition of the latest knowledge in all branches of learning, by the Muslim male and female thus bringing, about a metamorphosis in their stature in the world. Allah does not change the condition of and Community unless the Community by its own efforts changes its outlook, conduct and character. Ijma has an effective part to play in changing a moulding the conduct and character and outlook of the Community. Empty.

Formality! Why don't you leave us?

Spirit of Islam! Why did you leave us?

# THE UNIFORM CIVIL CODE

## Its Constitutional Validity

Mr. Mohammad Ghouse

*Lecturer, Faculty of Law, A. M. U., Aligarh*

## I

Article 44 of the Constitution of India, directs the State to secure to all citizens a uniform civil code (here after the code).

As such a code is intended to replace personal laws of all communities. There are doubts in some quarters as to its constitutional validity. The contents of the code and the values to be incorporated therein are not known. Let the question of its constitutional validity be examined from a limited perspective. Will the code, in so far as it seeks to abrogate Muslim Personal Law, abridge freedom of religion and the cultural right of minorities guaranteed in articles 25, 26 and 29 respectively.

## II

The Constituent Assembly Debates do not throw any light whatsoever as to the values to be incorporated into the Code. Dr. Alladi merely said that "A civil Code... runs into every department of civil relations, to the law of succession, to the law of marriage and similar matters."[1] This, however, clarified that the code would replace, inter alia, the Muslim Personal Law. The Muslim members of the Constituent Assembly were

[1] Constituent Assembly Debates (hereafter C.A.D) Vol. VII, 549 (1948).

not agreeable to the abrogation of their personal law. Mr. Mohammad Ismail[1] tried thrice unsuccessfully to safeguard Muslim Personal Law by getting it exempted from Article 44 and by getting a protective clause enshrined in Article 19 or 25. He pleaded forcefully that Muslim Personal Law, indeed all personal laws, operating within the limits of the families of the communities, do not in any way affect other communities. "In other matters", he emphasized, "Such as evidence, transfer of property, contracts ... the Civil Code will operate and will apply to every citizen of the land to whatever community he may belong."[2] He also reminded the Constituent Assembly that in regard to cow-slaughter, which is a purely religious question, an obligation had been placed on other communities than the one which considers the prohibition of Cow-slaughter as a religious matter. Observance of personal law, he said, does not involve any such compulsion.[3] He also pointed out that "the matter of retaining personal law is nothing new; we have precedents in European Countries. Yugoslavia... is obliged under treaty obligations to guarantee the rights of minorities. The Clause regarding rights of Mussalmans reads as follwos:

The Serb. Croat and Slovene State agrees to grant to the Mussulaman in the matter of family law and personal status

---

[1] The three amendments proposed by him were.

(i) Sir, I move that the following provisions be added to article 35: Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law. (C.A.D. VII, 540)

(ii) Sir, I move that after Sub-clause (g) of Clause 1 of Article 13 the following new sub-clause be added: (h) to follow the personal law of the group or Community to which he belongs or professes to belong. C. H. D VII, 721

(iii) That after clause (2) of article 19 the following new Sub-clause be added:

[2] Nothing in Clause (2) of this Article shall effect the right of any citizen to follow the personal law of the group or community to which he belongs or professes to belong. C. A. D. VII 830

[3] Id. at 722

provisions suitable for regulating these matters in accordance with the Mussalman usage."[1]

In their replies to the debate on Article 44 Munshi, Alladi and Ambedkar emphasized the need to divorce religion from politics[2] to construe religion so as not to cover every field of life and to unify, as far as far as possible, our whole life.[3] Considering the post-partition tumults and turmoils during which the Constituent Assembly adopted, among others Article 44, the charge of Isolationism and of reposting greater confidence in the British rule than in a democratic rule leveled against Muslims by Munshi and Alladi should not be taken seriously.[4] Their plea that there was no special safeguard with respect to minorities in advanced Muslim Countries,[5] that in European countries there were uniform civil codes for all citizens and that the NWFP and some Muslims in Bombay and Malabar were not subject to Shariat Law might be dismissed as irrelevant.[6] Their contention that enactment of a uniform civil

---

[1] Id. at 541

[2] Id. at 546-552

[3] Munshi: We want to divorce religion from personal law from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion. I fail to understand ... If, however, the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put out foot down and say that these matters are not religion, they are purely matters for secular legislation.(C.A.D. VII, 547)
Alladi: The Article (44) aims at amity ... The idea is the differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. (C.A.D. VII, 549)

[4] ... I want my Muslim friends to realize this the sooner we forget this isolationist outlook on life, it will be better for the country. (C. A. D. VII, 548)

[5] After all the only community that is willing to adapt itself to changing times seems to be the majority community in this country ... Why should our Muslim friends have greater confidence in greater faith in the British rule than in a democratic rule which will certainly have regard to the religious tenets and beliefs of all people? (C.A.D. VII, 550)

[6] Munshi: Nowhere in advanced Muslim countries the personal law of each minority has been recognized as sacrosanct as to prevent the enactment of a

code might secure and ensure national unity seems, in view of the reaction of the Muslims, who cherish Muslim Law, highly debatable. Abrogation of Muslim Personal Law and imposition of a uniform civil code on Muslims and other may, on the contrary, retard national Unity.

Dr. Ambedkar, being aware of this danger, assured the Muslims that the Code, when enacted, would not be imposed on all citizens. The Citizens, he said would be required to declare voluntarily that they would be governed by the Code. For this, he pointed out; the Shariat Act of 1937 offered a precedent. That Act had provided that the Shariat Law would be applicable to those Muslims only who hitherto governed by different law declared before a specified officer of State that he was willing to be bound by it.[1]

## III

Do Articles 25, 26 and 29 of the Constitution Safeguard Muslim Personal Law? Article 25 guarantees freedom of religion to individuals; Article 26 to religious denomination. Article, 29 guarantees a right to any Section of the citizens having, inter alia, a distinct culture to conserve it. Freedom of

---

civil code. Take for instance Turkey and Egypt. No minorities in these countries are permitted to such rights. (C.A.D. III, 547)

Alladi: When the British occupied this country, they said, we are going to introduce one, criminal law in this country which will be applicable to all citizens, be they Englishmen be they Hindus, be they Muslim.

Did the Muslims take exception, and did they revolt against the British ...? I should like to know ... whether different personal laws are perpetuated in France, in Germany, in Italy and in all continental countries of Europe... (C.A.D. 549)

Ambedkar: My honorable friends have forgotten that apart from the North-West Frontier-Province uptil 1937 in the rest of India, in various parts such as the United Provinces, the Central Provinces and Bombay (and Notrh Malabar) the Muslims to a large extent were governed by Hindu Law of succession. (C.A.D. VII, 551)

[1] C.A.D. VII 551

religion is subjected to public order, morality and health, the power of the State to provide for social welfare and reform.

In a host of cases on freedom of religion the Supreme Court has held that Articles 25 and 26 protect only those practices which constitute an essential and integral part of religion and that the State can regulate secular practices surrounding a religion.[1] Therefore Muslim Personal Law can claim the protection of Act 25 and 26 only if it is established that marriage, inheritance and the other areas covered by it are essential and integral parts of Islam. That this law is a divine law is not quite relevant.

The judicial decisions on the validity of some branches of Hindu law throw light on whether the social relations like marriage are integral parts of religions. In Ram Prasad *V.* State of U. P.[2] the Allahabad High Court held that performance of a second marriage during the life-time of the first wife was not an integral part of Hindu religion; nor could it be regarded as professing or practicing or propagating Hindu religion. Even if bigamy were regarded as an integral part of Hindu religion, the law abolishing it would be valid as a reform under Act 25 (2) (b). In *State of Bombay* V. Naras[3] the Bombay Prevetnion of Hindu Bigamous Marriage Act 1944, was upheld as measure of social reform covered by Act 25(2) (b). In *Srinivasa Anjar* V. *Saraswathi Ammal* [4] the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, was also upheld as a social reform.

These decisions make it explicitly and emphatically clear that the social relations governed by Hindu Law are no essential and integral parts of the Hindu religion. And even if they are, they are still not immune from state-regulation. It is, thus evident that Muslim Personal Law also is not immunized from State regulation.

---

[1] See Mohammad Ghouse, Religious Freedom And the Supreme Court of India, (2 Aligarh Law Journal, 60-85 (1956)

[2] A.I.R. 1961 All 334

[3] A. I.R. 1952 Bom. 84

[4] A.L.R 1952 Mad. 193

Article 29 will be violated if abrogation of Muslim Personal Law Prevents the Muslims from conserving their culture. This involves a very difficult question as to the relation between the culture and personal law of Muslims. Do the Muslims lose their cultural identity if their personal law is abrogated? The contours of the right to conserve culture enshrined in Article 29 have not been delineated yet; but the court had declared that the right guaranteed in that Article is an absolute right, which cannot be subordinated even to national interests. Thus, this is the only provision which provides the Muslims with a base to launch, whenever expedient, and act on the uniform civil code. But it is doubtful whether the attack will be successful. For it is not easy to establish that abrogation of Muslim Personal Law trenches upon the right to conserve culture. Besides the Court will also take into account the goal-values implicit in Article 44 in examining the validity of the code.

## IV

There is thus, hardly any constitutional safeguard for Muslim Law. On the Contrary there is a constitutional provision Article 15(1) which threatens to render void very important branches of that law. The Muslim Law of inheritance assigning one share to a daughter and two to a son and the law relating to divorce authorizing the husband, but not the wife, to resort to divorce without assigning any reason whatsoever come within the range of fire of Article 15(1), which prohibits discrimination on, inter alia, the ground of sex. It is beyond doubt that assigning one share to a son is a discrimination against the daughter. If therefore, the law of inheritance in so far as it discriminates on the basis of sex, is invalidated the shares of other heirs would be affected radically.

In view of all this it will be wise for Muslims not to think in terms of legal remedies. The remedy, if there is any remedy, should be sought elsewhere.

# MUSLIM PERSONAL LAW

Mr. Zafar Ahmed Siddiqi

*Secretary Deeni Taleemi Council U.P.*

There is great controversy in the country about the desirability or not of making changes in the Muslim personal law to suit Uniform Civil Code through the territory of India as provided in Article 44 of the Constitution.

The constitution on the one hand has guaranteed freedom, to profess, practice and to propagate religion, in the form of fundamental rights given in part III of the Constitution (vide Articles 25, 26 etc.), on the other hand in part IV (Directive Principles of State Policy) has laid responsibility on the State to secure for the citizens a Uniform Civil Code throughout the territory of India (vide Article 44).

To avoid any controversy about various provisions in the Constitution Article 13 of the Constitution has clarified the position.

Article 13 (2) of the Constitution provides "The State shall not make any law which takes away or abridges the right confessed by this part and any law made in contravention be void."

There are two aspects of the case:

(1) Where the state is competent to make changes in the Muslim Personal Law

(2) Whether it is desirable to make changes in the Muslim Personal Law.

Regarding the 1st point, I wish to deal with the constitutional aspect of the case and show the distinction between the worth of fundamental right given in part III, and Directive Principles of State Policy given in part IV of the Constitution.

In Gopalan Vs, State of Madras reported in A. I. R. 1950 S. C. 27 (72) Patanjali Satri, J (as he then was) observed as follows:

"There can be no doubt that the people of India have in exercise of their sovereign will as expressed in the preamble, aborted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the Legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so called."

The above mentioned observation is clear enough to show that Legislature, the Executive or Judiciary have no right to interfere in the fundamental right which the people have kept reserved for themselves.

In special reference No. 1 of 1958 on the Kerala Education Bill 1957, reported in A. I. R. 1958, S.C. 956 (Special Para 8, page 966) their Lordships held:

"The Directive Principles of State Policy have to confirm to and run as subsidiary to the Chapter on Fundamental Rights."

In Rev. Sidhraj Bhai Salhaj vs. State of Gujarat reported in A. I. R. 1963 S. C. 540 (547) while dealing with fundamental right given in Article 30 (1) of the Constitution, the Hon'ble Judges of the Supreme Court held:

"The right is intended to be effective and is not to be whittled down by so called regulative measures conceived not in the interest of the minority institution, but for the public of the nation as a whole."

Thus it is clear that Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislature or executive Act or Order, except to the extent provided in the appropriate Article in Part III (vide A.I.R. 1951 S.C. 226 (227).

Now we have to see what rights have been guaranteed in Part III of the Constitution Article 25 of the Constitution with regard to freedom of conscience and free profession, practice and propagation of religion is prefaced with the words "Subject to public order, morality and health." Similar is the position in Article 26. This prefacing has created much controversy and confusion. But in order to interpret these words we have to see the spirit behind providing fundamental rights which according to the ruling reported in 1963 S.C. 540 (547) must be real one and not "a teasing illusion, a promise of unreality"

Therefore a sharp distinction must be drawn between religious faith and belief and religious practices, as pointed out by Mr. Chagla C.J. in case State of Bombay Vs. Narasu Appa Mali reported in A.I.R. 1952 Bombay 84, paras 5 and 6. In this respect distinction has to be drawn between Islam and other religions. Islam not only preaches relation of man with God but provides a complete Code of Life which embraces his relations with human beings, State and other worldly affairs, while other religions are mainly concerned with personal relation of individual with his creator or the higher agency which he believes regulates his existence and the forces of the Universe. His relations with human beings and other matters are guided by religious practices.

Of course religious practices which are not part and parcel of religious belief cannot run counter to public order, morality or health or a policy of social welfare upon which the State has embarked but it is duty of the State to protect religious faith and belief. In Islam, marriages, divorces, succession, relation with human beings and State and the like are part and parcel of religious faith revealed by God in the Holy Quran, expounded by the Holy Prophet collected and codified by learned Imams.

The Almighty God proclaimed:

"Today I have completed your religion (Islam) and bestowed finally my bounties." Therefore any attempt to make any change in Muslim personal law will mean interference in Islamic religion and will amount to rebellion against the Almighty and his Holy Prophet Mohammad (peace be on him).

As regards the second point i.e. desirably or not of making changes in the Muslim personal law to suit the condition of the present time, I have only to say that no doubt Islam is not a static religion but a dynamic one and able to meet all the exigencies, problems and situations that may come till Dooms Day. Thus therefore Islam has permitted *Ijtihad* and *Ijma* in order to cope with the problems in which there is no clear guidance in Holy Quran or Hadis Sharif. But it is for the Ulamas, religious divines and Mujtahids to sit together and take decision if necessity arises. Even they are not entitled to make any change in the laws in which there is no ambiguity and have been clearly propounded by the Holy Prophet.

The absence of any state religion and guarantee of religious freedom to all its citizens is peculiar characteristic of our constitution.

It will be a tragedy if in the name of securing Uniform Civil Code the State tries to mutilate the Muslim Personal law.

The population of India consists of persons who profess different religions and are emotionally attached to their religious beliefs and practices which are so clear to them. The problem of national integration is essentially one of harmonizing such differences by enabling different religious groups in the country to profess and practice their religious beliefs freely without any interference from the Sate.

# MUSLIM PERSONAL LAW:

## THE INTERNATIONAL PERSPECTIVE

# CONTEMPORARY TRENDS IN MUSLIM PERSONAL LAW

Mr. Fazlur Rahman

*Dept. of Theology, A. M. U. Aligarh.*

Muslim Personal Law refers to those legal doctrines upon which is founded the structure of the Muslim Family and which regulate and govern the relationship among its members. In it are included those laws which relate to marriage and divorce, to the rights of children and relatives and to the finances of the family, to inheritance, bequests, waqfs and various other allied matters. It is in fact the residue of the traditional Islamic doctrine of Fiqh which, until the advent of Western Powers on the political scene, reigned supreme in the Muslim land. It has since been driven out of operation as public law, and restricted to the matters aforementioned. This has been one of most outstanding, remarkable and far-reaching developments in the legal history of Islam. Except in Saudi Arabia, Yemen and some other states in the Arabian Peninsula, which until today retain the personal as well as the public law of Islam and except Turkey which has abolished them both, Muslims everywhere else have, ever since, been governed by a dual system of law. Their public life is being regulated by the laws imported from western legal systems while their personal laws are derived from traditional Islamic legal doctrine. They have, however, chosen different schools of Islamic jurisprudence which vary on certain legal points. The Muslim of India, Pakistan, China, Japan, Syria, Egypt and most of Iraq follow the Hanafi version while Maliki School has been adopted by the north African states.

However, even this portion of Islamic law has Hanbali version of fiqh upheld by Saudi Arabia and the Zaidi School by the people of Yemen. In Iran and parts of Iraq the school of the Twelve Shia is followed from time to time being subject to modification, adjustments and changes in many Muslim countries. These developments have been the source of a lot of misunderstandings and much wild speculation. It is the aim of this paper to briefly describe these developments and to evaluate the nature and extent of these changes and the forces underlying them.

Let us begin with Egypt which among all the Arab countries has been the focus of attention for the outside world. It was in 1914 that committee of competent jurists of the four schools of Fiqh was set up in order to survey the Muslim personal law of Egypt which was derived exclusively from Hanafi fiqh and suggest such modification as may be regarded more suitable to the changed social conditions. It was understood that the Committee would not be bound by the Hanafi School of fiqh but would be free to draw upon the rest of the three schools. The Committee completed its work in 1915 and laid down a detailed code of personal status in which all issues regarding various aspects of family life were settled according to the best rulings of the four schools. Strong opposition from various quarters resulted in the abandonment of this Code and threw it into complete oblivion. In the meantime Ottoman Family Law was promulgated in 1971; its outstanding feature being that it borrowed freely from the other three schools of fiqh. We would discuss it later.

Until 1920 the Muslim Personal Law of Egypt, which followed exclusively the dominant views of the Hanafi fiqh, remained intact. It was the law No. 25 of 1920 which for the first time introduced some changes in the existing legal situation. This law was derived from certain views of Imam malik which related to alimony, dissolution of marriages and some related matters. Some salient points of this law may be enumerated as follows:

1. Alimony is to be treated as *al-dain al-qawi* (strong debt). The husband would be held responsible for it unless he pays it off or the wife remits the amount. It would not lapse either through divorce, death or temporary desertion of wife. It would be payable with effect from the date the husband refrains from paying it and not from the date the wife claims it.
2. The wife can claim dissolution of marriage in case the husband refuses to maintain her.
3. The wife of a person who has deserted her, can also claim divorce in a court of law. Divorce would not be granted if the husband's property permits payment of alimony. In case the husband's where about are unknown the judge may dissolve the marriage without issuing any summons, necessary only in cases in which the husband's whereabout could be known.
4. Divorce granted by judge on any one of above mentioned grounds would be revocable (*rajaie*) provided the *iddat* has not expired.
5. The wife was also accorded the right to claim divorce if the husband was afflicted with ailments which were incurable or if curable, would take a very long time, provided the wife had no knowledge of the same at the conclusion of Marriage or did not consent to it after she had come to know about it. This view is held by Malik, Ahmad and Shafei as opposed to the views of the Hanafi jurists except Imam Mohammad. The divorce on the basis of such defects would be an irrevocable divorce (*bain*) so that the wife may not be handicapped by the resumption of matrimonial tie by the husband.
6. The wife of an untraceable husband (*al Mafaqud*) could claim divorce on the ground that the whereabouts of the husband have not been known

for four years. *For purposes of inheritance the original Hanafi doctrine regarding the lapse of time was retained i. e., the death of his contemporaries.* The law No. 25 of 1929 which laid down that a divorced wife could not claim alimony for more than one year from the date of the divorce. This is based upon the view of the Maliki jurist Muhammad bin al-Hakam.

The wife's right to claim alimony for three years according to the Law of 1920 law restricted by Law No. 26 of 1929 to one year only. The law of 1929 barred the courts from hearing any petition claiming alimony for more than 365 days. The Law No. 78 of 1931 laid dow that petition for alimony would not be heard after a lapse of three years.

In 1923 Law No. 56 fixed the minimum age of marriage for males as 18 years and for females 16 years. The law laid down that no marital claims would be entertained by the court if the age of the husband of wife at the time of contracting marriage was below the fixed minimum. The officials were also forbidden to register any such marriage. It was later modified by the law No. 78 of 1931 which laid down that court would not hear the petition if the age of the parties in a marriage contract was found below the fixed minimum not at the time of marriage but at the time of filing the suit. This law disapproved by most of the people and a strong opposition was manifest in various religious and legal circles. It was thought the law in no way contributed to furthering of public good. It was, moreover, not based upon the opinion of any of the four schools of fiqh, but was said to draw its validity from the opinions of some less known jurists as Uthman al-Butti, Abdur Rahman ibn Shubrumah and Abu Bakr al-Asamm but in fact was founded upon the principle of barring the courts from hearing petitions and thus placing it outside their jurisdiction. It seemed to be influenced by the Ottoman Family Law of 1917, the distinction between the two beings that the Ottoman law declared such marriages as void, which is the actual opinion

held by the said three jurists, while the Egyptian law resorted to the principle of restriction of the Jurisdiction of the courts. The law, however, withstood the opposition under the strong backing of Sa'd Zaghlul, who at that time was at the helm of affairs and was not only a close friend of Qasim Ameen but also subscribed to his opinions that were based on ultra-Islamic views regarding the principles of social reconstruction.

In 1926 a bill was submitted to the Parliament containing the following provision:

1. That no husband could marry more than one wife except with the express permission of a special judge. The judge could grant such permission only when the ability of the petitioner to accord equitable treatment to all his wives and to maintain her and other relatives whom he is legally bound to do so has been established.

2. Every stipulation made by the wife at the time of contracting the marriage is binding on the husband. It must be fulfilled and adhered to otherwise she would have the right to get the marriage dissolved. This provision was taken from that Hanbali fiqh and had been previously incorporated in the Ottoman Family Law of 1917.

3. Suggestions for improving the methods of divorce were also put forward. These were: A divorce pronounced under duress (*ikrah*) or during intoxication (*sukr*) is void (a view held by all the three schools). Likewise a pronouncement of divorce made conditional upon the commission of an act or abstention therefrom or deferred to take effect in future, whereby what is really intended is not divorce but an emphatic assertion, would not be deemed as divorce (a view held by Daud Zahiri and some of the Shafii and Hanbali jurists and is not recognized by the four Imams). (It also laid down

that every divorce would be revocable except that which completed the third pronouncement). The pronouncement of divorce indicating numbers however large, or silent indication thereof, would be counted as one divorce only. This is also the opinion of some companions of the Prophet, a few Zahiri jurists, such as Ibn Taimiya and Ibn Qayyim as opposed to the view of the four Imams.

4. Modifications were also suggested by increasing the number of cases when a wife could apply for a divorce. For example an aggrieved wife could seek divorce on the following grounds:

a) Injuries inflicted by the husband on his wife through words of deeds.

b) Absence of a husband for more than one year thus causing injury to the wife.

c) Imprisonment of a husband for three years or more. These ideas were borrowed from the Maliki and Hanbali doctrines.

5. Setting aside the Hanafi view about parentage (*nasab*) that all children born after marriage would be attributed to husband even if the husband and the wife have not actually met but that their meeting could be possibly construed to have taken place provided the husband does not disown them, it was suggested that the courts be barred to entertain suits regarding parentage if it is established that the husband and the wife have never met *Matrimonially* (a view held by the rest of the three schools) or that the child was born after a lapse of one year from the death of the husband or the conclusion of a divorce. It confirmed to the view held by the Maliki jurist Ibn Abd al-Hakam.

Various provisions of the bill were severely attacked by the reputed Ulema of al-Azhar though some of them supported it. The main target of attack was the restriction placed on polygamous marriages. The bill remained pending with the Ministry of Law for some time but was finally passed as Law No. 25 of 1929 with the significant deletion of the clause placing restriction on polygamy and the one relating to the stipulations made at the time of marriage and some modifications in the provision concerning untraced husband (*mafqood*).

It was not until 1943 that the idea of placing restriction on polygamous marriages and the right of divorce was again revived by the ministry of Social Affairs. At this time it was accompanied by a fatwa of Sheikh Mohammad Mustafa al-Maraghi, the then Sheikh al-Azhar, issued in favour of restricting divorce and polygamy. Restrictions on polygamy were similar to those suggested in 1925 but as regards divorce it was provided that it should not take effect except in the presence of a judge. It was further suggested that a person who divorces without the prior permission of a judge is liable to imprisonment for three months or fine of one hundred Egyptian pounds. These suggestions, however, could not find their way to the Parliament as the bill was shelved by the Prime Minister himself.

In 1945, however, the bill was again bought in by the Ministry of Social Affairs under the leadership of another Prime Minister. It was claimed by the Ministry presenting the bill that polygamous marriages and divorces were solely responsible for juvenile delinquency. It was later detected that these tall claims were not based on any empirical evidence. Rather it ran counter to these preposterous claims. The protagonists or restrictions also claimed that polygamy caused immense mental agony to the fair sex. For the third time the efforts to abolish polygamy and place restrictions on one's right to divorce were attacked fiercely not only by the Ulama and the educated class but also by the public. It is said that the

Sheikh al-Azhar Mustafa al-Maraghi who had supported the bill withdrew his support later and that his withdrawal was also recorded with the Ministry of Social Affairs.

The Egyptian revolution took place on 23 July 1952. By the end of 1953 bills were again presented regarding the two issues. Before submitting these bills for a legal discussion, a Committee was set up to consider the whole matter on statistical basis. It was found out that there was not the slightest need for enacting such legislation. The authorities of the Ministry of Social Affairs expressly declared that the problem of polygamous marriages did not even exist and that it consequently needed no solution whatsoever. As a social institution polygamy was, in the opinion of the Ministry, on a decline. It was also contended that the polygamous marriages do not have their source in the male partner; it is in fact a phenomenon originating in the joint will of man and woman, the woman being the stronger force behind it. The problem was also discussed at the Conference of National Unity held in 1960 and it is reported that the President Jamal Abdel Nasser held the view that it was a problem whose proper place was among the political and social issues, and it may be left to persuasion and exhortation. Legislation on such matters could only complicate matters.

**Inheritance:**

Hanafi version of the law of inheritance was also modified by adopting rules of the schools of fiqh through the Law No. 77 of 1943 which codified the Islamic law of inheritance. Most important of these modifications were as follows:

1. Only a deliberate crime of murder deprived the killer from inheriting from the person murdered, thus adopting Maliki view.
2. Ikhtilaf-e-darain did not operate as a factor depriving a person from inheritance.

3. Opinion of Imam Abu Yusuf was adopted as regards the right of inheritance of maternal relations.
4. Grandfather would not exclude brothers and sisters of the deceased and they could take share along with him in conformity with the view of Abdullah b. Masood and Laid bin Ma.
5. Radd would be made upon the husband or wife if either of them dies leaving no near relative, thus adopting the view of Othman b. Affan.

Compulsory Bequest:

The Law 71 of 1946 laid down that bequest is to be made compulsory in favour of the son of a predeceased son equal to the share of his father if he were alive. It was intended to safeguard the interest of a son whose father died before the grand father and who could be excluded by his uncles. The basis of this law is not opinion of a single jurist but it is an amalgam of piecemeal opinions of several jurists like Imam Shafii and Ibn Hazm put together.

The law, moreover, laid down that one third of the property could be bequeathed in favour of some heirs even without the approval of others. This provision of law which runs counter to the views of four schools and the established practice has been the subject of much adverse criticism. It has been held as a clear digression from basic rules of the Shariat. The Egyptian law has adopted the Shia Imamia viw in this respect.

**The Waqf:**

The Law No. 48 introduced the following changes in the existing laws:

1. Waqf was declared to be revocable unless made for a mosque thus adopting the Hanafi view.

2. Perpetuity of waqf as held by Imam shafii, Ahmad bin Hanbal and the two disciples of Imam Abu Hanifa, was also abolished and Maliki view, adopted instead, which allows the creation of a waqf for a limitd period and the reversion of the ownership to the waqif and his heirs.
3. Conditions relating to waqf deed restricting the liberty of beneficiary as regards marriage, residence etc. was deemed to be void. It was based on Hanbali and Maliki views.
4. Only one-third of the property could be given in waqf. In 1952 the revolutionary regime enacted law No. 180 and abolished Family waqfs and all those that were not meant for charitable purposes. Under this law the ownership of dissolved non-charitable waqfs reverted to the waqif if alive and if not, to the beneficiaries thereof.

**Syria:**

Syria remained under the Ottoman rule till 1918. The Ottoman Family Law (*Huquq al-Ailah*) was promulgated in 1917 and was applied to Syria and remained in force in that country till 1953, long after the termination of the Ottoman rule. It was one of the sources of Syrian Law of Personal Status of 1953. It would, therefore, not be out of place if we deal with it in some detail. The most outstanding feature of the Ottoman Family Law, as stated before, was that it introduced the principle of *Talfiq* in the sphere of Muslim Personal Law, which meant that the Hanafi doctrines alone were not adequate to meet the needs of time and that the legislature was free to adopt the views of other schools of law after giving due consideration to the existing social and economic practices. Moreover, the Ottoman Code was an admirable attempt to clear the way for the Muslim Jurists and judges who experienced immense difficulties in finding out and ascertaining the law or

the dominant view of a school on account of the uncodified nature of the whole body of Islamic Laws.

The Ottoman Code contained substantive as well as adjectival law. As regards the adjectival law the Ottoman Code laid down a certain procedure to be adopted before a marriage was contracted.

Such marriages as did not follow the prescribed procedure were not, however, declared void by the law. Instead the Courts was not allowed to hear petitions in respect of such matrimonial ties. Child marriage was however declared void on the basis of the views of Uttman al-Butti, Ibn Shubrumuh and al-Asamm contrary to the Hanafi opinion. It shows that the Ottoman Family Law was more opposed to child marriages than the Egyptia law of 1923 which did not declare such marriages void but simply placed them outside the jurisdiction of the courts. The Ottoman law prescribed 18 years as the minimum age of marriage for males and 17 years for female (it was) 18 and 16 years respectively in the Egyptian Law of 1923). Contrary to the Hanafi opinion which considers the manifestation of puberty as the conclusive proof of eligibility for marriage whatever the age. At the same time the Ottoman law adopted a cautious approach towards the problem and laid down that a judge could if he deemed it proper, permit a person or adolescent age to contract marriage even earlier. On the other hand, the law made the permission of guardian a basic requirement of marriage in accordance with the Shafii view as opposed to the dominant Hanafi opinion. The law also rejected the Hanafi opinion and adopted instead the view of Imam Shafi and Ahmad b. Hanbal in prohibiting the marriage of insane man and woman, except on ground of exigency and after due permission from a judge. A dopting the Hanbali view a woman also accorded the right of stipulating at the time of marriage that the husband would not marry a second wife. Failure to abide by this condition would entitle the woman to get the marriage dissolved. Such stipulation according to Hanafi School is void. The law also conferred upon wife the right

demanding dissolution on certain grounds which, though not recognized by the Hanafi school,were admitted by Shafii and Ahamd b. Hanbal. Divorce under duress and in the state of intoxication was also declared as null and void, in accordance with the opinion of schools other than the Hanafi one.

Syria thus followed the rules laid down by the Ottoman Family Law till 1953 when the Syrian Law No. 59 introduced some modifications. The Ottoman Code did not include Wasiyat and Meerath, while the Syrian Law No. 1953 contained legislation of family matters as well as Wilayat, Wasiyat and Inherithance. It is not, however, comprehensive enough to include each and every problem of personal law and consequently down in Article 305 that 'Cases not covered by the provision of the law shall be decided according to the dominant views of the Hanafi doctrine'. Inspite of this the law has adopted views of not only other established schools of fiqh but also the opinions of some much less known jurists of Islam who do not owe allegiance to any of the established schools of law, and in this respect follows the Course of the Egyptian Laws of 1920 and 1925. The more salient features of this law may be described as follows:

Article 19 lays down that a judge is entitled not to allow a marriage to be contracted in case there exists wide difference between the ages of the suitor and the fiancée and the marriage serves the interest of none. The provision has been criticized adversely by the learned personalities of the Arab world and held to be an undue restriction and an encroachment on personal liberty.

The new law also places restriction on the practice polygamous marriage though in the same roundabout manner Article 17 lays down that 'The judge may not accord permission to the husband of a wife to contract another marriage in case it is proved that he is unable to support two wives. The article has been so construed by the Syria judges as prohibiting polygamy and the permission to take a second wife

has since been accorded only rarely. The commentators of the Syrian law have taken it as an introduction of Christian doctrine into the personal law of Muslim.

The Syrian law also introduces the institution of compulsory bequest and follows the Egyptian laws of inheritance and Bequest of 1943 and 1946 in instituting some modifications in the laws of inheritance.

Moreover, the Syrian Law of Property No. 3339 of 1930 has placed restrictions on the right of pre-emption in as much as it has abolished the right to pre-emption on grounds of vicinage and retained it on ground of partnership. Restriction have also been placed on the right to pre-emption on the basis of easements.

In 1949 Syria anticipated Egypt by taking the drastic step of abolishing the waqf *dhurri* (Termed waqf ahli in Egypt). Egypt could do the same only in 1952 when the new regime assumed power. The charitable waqfs of Syria remained, However, unaffected. Through leagislative Decree No. 76 of 1949 waqf *dhurri* was prohibited, any registration of the same was deemed to be void and the awqaf dhurria established prior to 1949 were dissolved. It was, however, a radical departure from the established principles.

**Jordan:**

Jordan also followed the Ottoman Family Law until 1951 when Jordanian Law No. 92 was promulgated and named a 'Family Law' after the name of its predecessor. It is mainly based on the Ottoman Law, as suggested by its name, and incorporates many of the provisions of that Code. The Jordanian law is mainly derived from Hanafi fiqh while at the same time recognizing the modifications introduced byt the Ottoman Family Law. For example it follows the opinion of Imam Abu Hanifa regarding the minimum age for majority, allows the adolescednt to marry, recognizes the stipulation

made by the wife at the time of marriage as binding on the husband (a feature of the Ottoman Code), follows the procedural provisions laid down by the Ottoman Code. Jordanian law introduces an innovation while it lays down that 'A judge would not permit a marriage being contracted in case the difference between the parties exceeds twenty years; unless he has taken the express consent of the party younger in age, ensured that no duress or compulsion has been exercised and also ascertained that the marriage would be in the party's interest'.

The Jordanian law besides following the rulings laid down by the Hanafi Jurists. Has also adopted provision of the Egyptian Law No. 25 of 1920 and the Law No. 25 of 1929, though it differs from the Egyptian law regarding alimony and treats it as debt from the time the wife demands it and not from the time it is denied by the husband as laid down by the Egyptian law.

The Jordanian Law also grants to wife the right to apply for a divorce in the causes where the husband declines to support her and/or when the husband is aflicted with defects but does not make in *contingent on the immediate demand after acquiring the knowledge* of the defect. It also does not correspond to the Egyptian law in recognizing the right of wife to demand divorce on account of infliction or oral bodily injuries. The judge in such cases after the appointment of two arbiters would issue a decree of separation on the ground of Khula. As regards the duration of Idda for which alimony could be claimed Jordan follows the actual rulings of the Hanafi schools and does not agree with the Egyptian Law No. 25 of 1929. So far as the maintenance of the relatives is concerned Jordanian law has adopted the view of Imam Ahmad bin Hanbal.

**Iraq:**

Not long ago Iraq presented the typical picture of a country whose political destiny had been resting for quite some time in the hands of those who did not believe in the ideology which had for centuries formed the basis of individual life. It was during such abnormal conditions that the Iraqi law of Personal Status was promulgated in 1959 which did not contain even an iota of Islamic teachings. It out rightly prohibited polygamous marriages and adopted a completely new system of inheritance which owed nothing to traditional law of the Shariah, but was borrowed from some Germanic sources. The purpose of this law was stated to affect a compromise on the national plane, since Iraq was populated both by sunnis and shias, each being in considerable numbers, by adopting a neutral system. The share in inheritance of a woman under this system was equal to that of a man. This Law of Personal Status was abolished by the Law of 1963 and the traditional Islamic law was restored to the people of Iraq. In Iraq the Hanafi fiqh had always been the source of all laws relating to personal matters but now the Iraqi Constitution has also made provision for the shia community residing in Iraq in no small numbers. Article 77 provides that justice would be administered to every community according to that version of Islamic law to which the parties in a suit subscribe. The appointment of judges is made in conformity with the sect to which the parties to a dispute belong. For Hanafis a Hanafi judge is provided, for Shia a judge of the same sect and for Kurds Shafai judges are provided. Baghdad and Basra each have two judges one Sunni and the other Shia. Thus we see in Iraq that views of five schools of fiqh are applied there four schools of sunnis and the Jafri school and detailed procedure has been laid sown for the parties who ascribe to different schools of fiqh. The Government of Iraq has issued in 1954 a Code of Personal Laws to avoid confusion and inconvenience. It resembles in some respects with the Egyptian Law No. 25 of 1920 and the Law No. 25 of 1929. It is based on the Code of Personal Laws

Prepared by Qadri Pasha which was in its turn derived solely from the Hanafi doctrine.

**Lebanon:**

The Lebanon personal law is in fact the adoption of the Ottoman Family Law of 1917 in to-to except some modifications relating to adjectival law by Decrees of 1938 and 1951. It is applied to all the Muslims except the Druze and contains Provisions relating only to marriage and its dissolution. It was in 1952 that a movement was launched by some social organizations demanding a uniform civil and personal code applicable to all the sections of the Lebanon population. It was firmly opposed both by the Muslims and the Christians and consequently had to be abandoned.

The Law of Waqf in Lebanon also confirmed to the Hanafi school until the promulgation of the law of 1947 which was patterned after the Egyptian Law of Waqf of 1946 which regulated the Waqf *Dhurri*. The more important changes were as follows:

1. Waqf was made revocable (adoption of Hanafi view).
2. Duration of waqf *dhurri* was limited (adoption of the view of Maliki and Hanbali school).
3. Conditions restricting the liberty of the beneficiary declared void (adoption of Maliki and Hanbali view).
4. Mutawallis made accountable for the waqfs.

**The Sudan:**

Strangely enough Sudan anticipated Egypt in instituting some modifications in its legal system. The Decree of 1902 authorized the chief justice to issue from time to time decrees,

in accordance with the will of ruler of the country, regarding the smooth running of the courts and the adjectival law. The decree of 1915 laid down that the Shariah Courts were bound to apply the best and the strongest opinions within the Hanafi school except in those cases where the chief justice had provisionally issued decrees or judicial ordinances which had the same effect as law, provided, it was recognized by the ruler of the country. As a result a decree was issued in 1916 (in anticipation of the Egyptian law of 1920) granting woman the right to demand divorce on the basis of the husband's refusal to maintain her.

**Tunisia:**

The Tunisian personal law is derived from the Maliki School which is also followed by Libya, Algeria and Morocco, which preserved their traditional systems of Islamic law virtually intact until very recent times. It was in 1956 that the Tunisian Law of Personal Status was promulgated, the salient features of which are as follows:

1. The Tunisian law does not restrict the right of stipulation on at the time of marriage to wife only, as done by the Ottoman Family law and the laws of Syria and Jordan. It keeps it open both to wife and husband, which is really the position of the adopted Hanbali doctrine. The Tunisian Law has, however, achieved this purpose by introducing the option of stipulation, *khiyar al-Shart*, in the marriage contract. It may be remarked that the Maliki School does not recognize such stipulations. The dissolution of marriage on account of non-fulfilment of the stipulation would take place according to the Hanbali law but it would be a *ba'in* talaq in accordance with the opinion of Maliki School.

2. The Tunisian law has abolished and prohibited polygamy. The husband who takes more than one wife is liable to imprisonment for one year or a fine of 24,000 francs or both. It thus makes polygamy a crime in itself. The law runs counter to the express provisions laid down by the Quran and the Sunnah and the established practice. The law is, however, silent about the validity of the marriages contracted in contravention of law.
3. It also lays down that the divorce does not become effective except (a) on the demand made by the husband or the wife for the reasons stated elsewhere; (b) on the mutual consent of the parties; (c) on the demand made by the husband or the wife, in which case the judge would ascertain the amount of money payable to the wife or by her to the husband as compensation. The view that divorce cannot be effective except before the court of law is completely alien to Islam and cannot be supported by the Quran, the Sunnah, the practice of the companions or the opinion of any jurist. It is also injurious to women. Moreover Islam does not recognize the equality between man and woman as regards the administration of divorce or compensatory allowance.

**Al-Maghrib:**

The Code of Personal Status of 1956 governing the Maghribi states is derived from the Maliki doctrine. Article 82 of the Code las down that 'the cases not covered by the provisions of the Code shall be decided in accordance with the dominant or well known opinion or the established practice of the Maliki School'.

The Code fixes the minimum age for contracting marriage as 12 years for the females and 15 years for the males but

provides that permission could be accorded to the boys even before the prescribed minimum if they are likely to indulge in illicit relations. Such marriages could take place only with the consent of the guardian.

It also lays down like Syrian and Jordanian laws that the ages of the parties must be reasonably proportioned, but contrary to both the laws recognized it as the right of wife only. It is a novel idea which does not find any support in the history of Islamic law.

The most important provision is that 'Polygamy is prohibited if there is a fear that equality among the wives could not be maintained.' The law thus gives the force of law to a Quranic provision otherwise a moral recommendation but does not lay the procedure to ascertain this fear.

The code does not recognize as valid a divorce pronounced during the menstrual period and compels the husband to resume the conjugal tie. It is the opinion of Shia and Ibn Taimiyah. Moreover the Code also provides that the registration of divorce shall be made in the presence of two reliable witnesses but then exist ambiguity about whether a divorce pronounced in contravention of the law would be construed as void or valid.

**Pakistan:**

Muslim Family law Ordinance of 1961 as promulgated by the Government of Pakistan provoked acute controversy. It provided Arbitration Councils to deal with the problems of polygamy and repudiation of marriage. Permission of Arbitration was made necessary before a person could remarry during the existence of his previous wife. The Council would give its consent only when it is satisfied that the proposed marriage is necessary and just. Legal sanctions for failure in obtaining the permission, though it does not render the marriage void. Moreover, repudiation, it is laid down, would

not be effective without the permission of the court. Procedure of reconciliation would be applied by the court after the pronouncement of repudiation which nullifies the immediate effects of various types of irrevocable divorces as recognized by the shariah. The ordinance also modifies the traditional law of inheritance by introducing the principle of full representation (son of a pre-deceased son) and disturbing the whole fabric of the system of inheritance.

**Arabian Peninsula:**

As told previously Saudi Arabia, Yemen, Aden, Hadramaut and some principalities of the Persian Gulf have immense to the contemporary developments in legal sphere. Islamic law remains fundamental law up to the present day and governs every aspect of legal relationship. However, Saudi Aarbia has recognized the principle of Talaq. A decision of the Judical Council of Saudi Arabia (1347 A. H.) lays down that if the judges find that any rule of Hanbali doctrine may in its application to any particular case cause hardship and be opposed to public interest, they may apply an interpretation prevailing in the other schools of law.

# METOHDS

From the foregoing description it may have become quite clear that certain modifications, alterations and changes have been instituted in Muslim Personal Law in various Islamic countries through the medium of legislation. The methods employed for bringing about these changes could easily be discerned by a perusal of these developments. These may be described as follows:

## 1. RESTRICTING THE COMPETNCE OF THE COURTS

It is and administrative measure and is based upon the prerogative of the Muslim sovereign, accorded to him by the Shariah, empowering him to define the jurisdiction of the Courts and set limits to the sphere of their competence. It was granted to enable him to take such administrative steps as may be in public interest provided no encroachment was made on the substantive law of Islam. The device has, in recent time; been used to restrict the courts to cases which fulfilled certain procedural and evidential conditions. For example the Jordanian Family Law of 1951 precluded the Courts from entertaining any pleas of divorce from a husband unless such repudiation had been registered before the Judge. The Jordaninan Law, thereby, has achieved the aim of getting the divorce compulsorily registered before the Judge. The Jordanian Law, thereby, has achieved the aim of getting the divorce compulsorily registered which otherwise it could not have been able to do except by directly infringing the substantive Islamic law which does not recognize the registration of divorce as its pre-requisite.

Egypt also used this procedural device with a view to counteract the effects of the excessive periods of gestation recognized by various schools of Fiqh. For example the maximum period of gestation according to Hanafi docrine is two years, while Shafie and Hambali schools lay it down as four years or even more. The extraordinary length of the periods seems to be laid down in special consideration of the effects of illegitimacy over the child and his mother; otherwise it seems reasonably to be a matter of expert medical advice. The Egyptian Govt guided by such considerations achieved the goal by laying down that the courts would not hear the claims of maintenance of an idea in excess of one year (Act 17 of the

Law 25 of 1929) without interfering with the substantive law of the schools of Fiqh.

The problem of child marriage was also dealt with the same device by the Egyptian Govt by enactment of Code of procedure of Shariat Courts of 1931. Algeria also did the same.

It is however quite evident that this prerogative of laying restrictions on the competence of courts has been exercised for what it had not been originally meant for. Through it is denied judicial relief otherwise tenable under the substantive law of Islam. It may be practically effective yet is indubitably a harsh and rough method of reforming the society. Moreover, it has its limitations. It could not be successfully used where the controversy is strongest Polygamy and males right to divorce.

## 2. TALFEEQ

Talfeeq means choosing between and picking out from different and variant opinions of Muslim Jurists. It is the method of developing law from within. It has ever since been employed as a moderating force for the concept of Taqleed which came to be firmly entrenched in almost all the schools of Islamic law and every part of Muslim world. Jurists followed the dominant views of their various schools and fatwas and decisions were given in accordance with the same. The Courts were bound to administer justice accordingly. But at the same time it has been a recognized principle that in cases of extreme hardship and genuine necessity, it was quite permissible to issue fatwa or give decision according to vasiant proceis of other schools of Fiqh. Genuine differences of opinion, while remaining within the fold of Islam has always been believed by the Muslims to be mercy of God but the immense practical value of the differences in view of the jurists of Islam and between various schools of fiqh may not always have been fully realized; it became apparent only when the attempts were

made to amend various laws which were really the expression of the dominant view of one school or the other.

Talfiq adopted as a method for bringing about changes and introducing modifications in the existing dominant views of a school of fiqh in the contemporary Muslim world assumes there different forms as follows:

**A. Choice made while remaining within the four schools of Fiqh.**

It is the most agreeable and least disputed form of Talfiq. Ottoman Family law of 1917 was first Code of Law to introduce it as a systematic method. This method adopts the dominant doctrine of one of the other three Sunni Schools as an alternative to existing Hanafi Law (Maliki Law for the States of North Western Africa). Wife's right to sue for dissolution of marriage on grounds of husband's cruelty, refusal to maintain her or his being applicated with serious ailments are but a few examples. Dissolution of Muslim Marriages Act of 1939 of India follows the same pattern. Stipulation of conditions in the Marriage contracts declared valid by the Ottoman Family Law of 1917, Morroccan Code of Personal Status of 1958, Jordanian Family Law of 1951 and Syrian Law of Personal Status of 1953, is also based on the same principle. These are all the cases of superseding the Hanafi Law. The Tunisian Law of Personal Status 1959, on the hand, supersedes Maliki rule.

**B. Choice made from isolated view of Individual Jurists.**

It is a less agreeable and more disputed form of Talfiq. The method adopts isolated views of less known jurists of one or the other school. It is backed by the same prerogative of the sovereign to instruct courts to apply certain views of law which may not be dominant and exclude other dominant or well established views. In this case the Court is bound to apply the

rules laid down by the sovereign. It was through this method that child marriage was declared void by the Ottoman Family Law of 1917. Jordan, Syria, Iraq, Tunisia and Morocco followed suit. The provision was supported by the views of Ibn Hazwr and such lesser known jurists as Uthman al Butti, Ibn Shabmmah and Abu Bakr al Asamm. Syria's adoption of maximum period of jestation as one year is yet another example. It was based on the opinions of the Maliki jurist Mohammad Ibn Al-Hasham. Provision of Talaq in Egyptian Law of 1929 also furnishes the example of the same they were declared to be based on the views of the renowned tabiis Atab Abi Raleeh and Qazi Shuraih. Repudiation of marriage which may be coupled with number, by word or sign, was to be counted as one revocable talaq according to the same law that was based on the opinion of Ibn Taimiya and Ibn Qayyim. Egyptian law of inheritances of 1943 also contains examples of this method.

### C. Fusion of Different Rules of Fiqh

It is the least agreeable and the most disputed form of Talfiq. It is the method of picking up legal rules and provisios nof the Islamic Law which may be even of different natures and diverse provenance and then fusing and knitting them into a coordinated and integrated unit. It is quite possible that the provision of one school may be applicable in quite other circumstances that the one combined with it. The Egyptian Law of Dahf of 1946 furnishes a good example of this method. It is an amalgam of Hanafi, Maliki, Hanbali and Zahiri Law. The Wakfs through this law were declared to be revocable which is the Hanafi view. It was done to counteract the tendency of a person to deprive his legal heirs by creating wakf and also to do away with the immobilization in perperity of huge areas of landed property. Further adopting the Maliki and Zahiri view, a maximum period for the duration of wakf was

laid down and the heirs were granted right of successions in the wakf property after the death of the Wakif.

Extensive use has thus been made of the doctrine of Talfiq and indeed it has yielded some wonderful results. Many seemingly unsurmountable difficulties have been resolved to the entire satisfaction of the legislators and the public. Relief has been granted to the oppressed and aggrieved parties. But the doctrine has some very serious shortcomings or dangers of its own, it may be most conveniently used as a back door to accommodate personal whims, spurious desirability and crooked tendencies. Traditional authoritative opinion could easily be manipulated to yield desired results. It is thus a double-edged weapon which must be used with utmost circumspection and exclusively on such occasion where there is genuine necessity and extreme hardship. It may not be out of place to remark that it is through this method that some pressing needs of the modern society have been met.

## EVALUTION

Muslim Personal Law as it stands today in the lands of Islam reflects all the trends, tendencies, aspirations, tensions, tumults and struggles manifest in the Contemporary Muslim Society itself. One may for example easily discern that there is found an earnest desire to retain the law of Islam, and to solve the problems of family life in its light. The practice of restricting the competence of the courts and the adoption of the method of Talfeeq to meet the contemporary requirement also very clearly high lights the aspiration to make these adjustments while remaining within the fold of Islamic Law.

On the other hand as a result of widespread Western education and culture highly westernized sections have appeared in Muslim Countries who are generally afflicted with a sense of inferiority regarding their cultural and academic

legacy especially the Islamic Law. The writings of Orienta lists have also contributed to aggravate this situation. They have presented Islamic law as a system of inhuman, outdated and absolute mores and principles acting as impediments in the way of a modern enlightened life. Prof. J.N.D Anderson's work may be cited as an example. This group generally rejects the religious character of Islamic law but seldom shows the courage to abolish Islamic law as such. It is driven by arguments of desirability rather than genuine necessity. This section of Muslim society is in constant conflict with the rest of the Muslim populations. Their goal is reconciliation of Islam with modern tendencies, through a replacement of the whole of the traditional Islamic fiqh or its provisions, by a west oriented legal system. The concepts of nationalist secular welfare state and the modern idea of sovereignty have also contributed to the strengthening of such tendencies. Among all the Muslim Countries Turkey furnishes one of such sad examples. Recent Tunisian and Pakistani legislations also present the same picture though on a limited scale. Moreover it is because of this conflict that contradictions have appeared in contemporary Muslim legislations of which the Family Law of Tunisia is but one instance which though abolishes polygamy retains the Islamic law of inheritance.

It is interesting and satisfying that a strong current, running counter to the modernistic tendencies has appeared in various Muslim Countries, whose aim is to provide the Muslim Community not only with a Code of personal law but also a complete Civil & Criminal Code on the basis of traditional legal principles and concepts.

It is a fact that huge volume of legal literature based on Islam which appeared during the last decade or so takes up most modern problems for study and may be justly said to be of finest quality.

We have just remarked that changes in Muslim Personal law have not always been the product of social evolution or the

result of genuine public opinion. They have at times been thrust on the Muslim Society from above. There have also been arbitrary and forced interpretations of the traditional sources of law. It may, however, be pertinently asked : has it always been the manifestation of un-Islamic modernistic tendencies or can there be discerned some genuine need for legal methods other than the procedural method of laying restrictions on the Jurisdiction of Courts and the employment of the principle of Talfeeq? In other words whether these two methods are completely sufficient to meet all the needs of the growing and developing modern Muslim Society. The answer is an emphatic though considered 'No.' We have shown that the method of placing restrictions on the competence of Courts is a very harsh one indeed, and excessive use of the principle of Talfeeq has resulted sometimes in unrestrained eclecticism which sometimes shows signs of being haphazard, and arbitrary. It is very difficult to maintain that the needs of a growing complex modern society can be fully met by employing these two methods. Recourse would have ultimately to be taken to that most sublime legal activity which is termed "*Ijtihad*" without which there is every danger of the Islamic law being relegated to oblivion and neglect.

# A COMPARATIVE STUDY OF RECENT CHANGES IN MULIM PERSONAL LAW IN MUSLIM COUNTRIES

Mrs. N. A. Haider, M.A., LL. M.

*Lecturer, Government Arts and Commerce College, Indore.*

In this brief paper it is proposed to deal with the recent changes in Muslim personal law in Muslim countries. The Islamic notion of law is; what is morally beautiful must be done and what is morally ugly must not be done. That is the essence of law and nothing else.

The doctrine of taqlid was rejected because it was considered to conflict with the fundamental principle of Islamic jurisprudence that what is beautiful and what is ugly may be changed according to the circumstances and the time. The recent reshaping of institutions of the Sharia by secular legislation in several Islamic countries takes its inspiration from modern constitutional and social ideas. New sets of facts constantly arose in life and they had to be mastered and moulded with the traditional tools provided by legal science.

First, in this line of development, the administrative law of the Ottoman Empire, into agreement with the Sharia. They distinguished themselves not only by their zeal for the sacred law but also by their legislative activity. The Sharia was, however, not officially abandoned. On the contrary, Ottoman Turkey is the only Islamic country to have tried to codify and to have enacted as a law of the state parts of the religious law of Islam. This is the Megelle (with 'its' full title megellei-ahkam-iadliyye) which covers the law of contracts and

obligations and of civil procedure in the form of articles, and was promulgated as the Ottoman civil code in 1877. Strict Islamic law is by its nature not suitable for codification because it possesses authoritative character only in so far as it is taught in the traditional way by one of the recognized schools. The experiment of the Megelle was undertaken under the influence of European ideas, and it is strictly speaking, not an Islamic but a secular coede. It remained in force (subject to subsequent legislation) in the territories, and later states, which were detached from the Ottoman Empire after 1918, where it was applied as the 'civil war' by modern secular tribunals, until it was replaced by new civil codes in Lebanon (1932), Syria (1949) and Iraq (1953) and it is still the basis of the 'civil law' of Cyprus, Israel, and Jordan. But in Turkey in 1926, in Albania in 1928, in the Muslim parts of Yugoslavia, Megelle was abolished.

During the 19th century, the effects on Islamic law of the western contact were upon the whole restricted to the adoption of the western form of codes subdivided into articles, in the Ottoman Megelle and in the codification of the Hanafi law of family and inheritance in 1875 by Muhammad Kadri Pasha for Egypt, which inspired a few similar private efforts in other countries; e.g. code Morand for Algeria and code Santillana for Tunisia was produced.

The legislative interference with Islamic law started with the Ottoman Law of Family Rights of 1917, which was later repealed in Turkey but remained valid in Syria, Lebanon, Palestine. It is still part of the family law of the Muslims in Lebanon and in Israel. Then from 1920 onwards, the impetus of modernist jurisprudence and of the modernist legislative movement inspired by it, came from Egypt. The important examples of this legislation in Egypt have been the enactment of 1920 and of 1929 in regard to family law, the legislations of 1931 in regard to the organization of the Kadis tribunals, of 1943 on inheritance, of 1946 on wakf and legacies, of 1952 which abolished the private or family wakfs and finally of 1955

which abolished the Kadis tribunals and unified the administration of justice in the hands of the secular courts.

This reshaping of Islamic law has evoked much interest and inspired similar movements in other countries e.g. in Sudan, Jordan, Lebanon, Syria, Iraq and Libya, where they went even further than Egypt.

The Egyptian act of 1946 served as a model for the Lebanese law of 1947 on wakf, and a Syrian act of 1949 in abolishing the private or family wakfs. The Syrian law of personal status of 1953 made it compulsory for the husband to prove his ability to support a second wife in case of second marriage.

In Iraq also in 1963 a uniform code of law of inheritance was made applicable to all Iraqi Muslims.

But all this evaluation of law did not arise out of a public demand but was imposed by governments when they fell strong to overcome the resistance of the traditionalists. That law as well as other human relationships must be ruled by religion has become an essential part of the outlook of the Muslims in the Arab countries of the Near East. That is why they do not wish to abolish Islamic law openly as Turkey has done.

As it has been stated earlier a legislation based directly on Islamic jurisprudence but to be applied by secular tribunals had been introduced in Tunisia known as code Santillana having the features common to Islamic and to Roman law. By 1956, Tunisia came in the forefront of the modern legislative movement. First of all the public wakfs were abolished and their assets became the property of the state. Secondly, the separate jurisdiction of the kadis tribunals was abolished. Thirdly, a Tunisian code of personal status was enacted. In these enactments certain features of traditional Islamic law were retained but polygamy was prohibited and made a criminal offence. Marriage can be concluded by the consent of the bridegroom and bride and divorce pronounced only by a

court of law under the following conditions: (1) at the request of one of the spouses, on the grounds specified in the code, (2) in case of mutual consent, (3) at the request of one of the spouses, in which case the court affixes the indemnity due to one spouse by the other. By these changes, wife has been equated with the husband in monogamy and divorce. At this stage, no change was introduced in the traditional law of succession. After about 3 years, a law of succession was passed which introduced certain important changes, in favour of daughter and the son's daughter.

In morocco also, on the basis of the Hanafi doctrine a mild modernist legislation was introduced and by the decree of 14 March 1938, the guardianship of minors was regulated. In 1957 and 1958, the Mudawwana or code of personal status and inheritance was enacted based not only on the Maliki principle of Istislah but also on the recognized method of later Islamic jurisprudence in Morocoo.

In Iran, the bulk of Iranian legislation was enacted between 1926 and 1938. The first part of Iranian civil code came into force in 1928 and the second part in 1935. This code contains the law of family and of inheritance. Although in Iran, the regular jurisdiction is that of the secular tribunals, but all the cases must first be referred to the tribunals of the Kadis by the secular tribunals. These tribunals follow the Shariah closely in all matters, but they disregard certain things which were absolete e.g. slavery.

The movement to bring the Islamic law in conformity with the modern thought is comparatively recent phenomenon in Pakistan, because there the concept of Ijtihad has much exercised the minds of scholars and they were much in favour of the traditional system. A commission was appointed which presented in 1956, its main recommendations concerning the law of marriage and divorce. These recommendations were adopted in the Muslim Family Law ordinance of 1961.

In India, as in Pakistan there is no recent change. Only the effect of the Eastern modern thought came in India in the shape of the Dissolution of Muslim Marriages Act of 1939. This Act does not lay down that its provisions shall be subject to the principles of Muslim law. The Act is complete in itself and crystallizes a portion of Muslim law which before it came into force was not codified and consisted of principles only. The rights of a Muslim wife have been greatly increased by this Act.

In India, also there is a limited desire that the Mohammadan law should be codified as it has been done in Egypt, Turkey, Iran and Palestine etc. In theory this is easy and to the reformer this would be a chance for breaking off with the past, but the task is not very easy. This can only be done by appropriate and permissive legislation; which can only bring Hindu and Muslim under one uniform law.

The development of Islamic law under French legal influence in Aligeria was in some respects parallel to its development under British influence in India, but widely different in its results. In the greater part of Algeria, the Kadis continued to apply Islamic law according to Maliki doctrine. The French administration even applied the Islamic law against custom. Positive legislative changes have been rare in Algeria too. They were mainly concerned with the guardianship of minors and the formalities of marriage and divorce, Culminating in an ordinance of 4th Feb. 1959, which lays down that the marriage has concluded with the consent of husband and wife, fixes minimum wages for marriage, and decrees that the marriage can be dissolved, other than by death, only by a judicial decision on certain grounds at the demand of husband or wife or at their joint demand. Thus Islamic law as applied in Algeria, too, has become an independent legal system.

In this way Islamic jurisprudence did not grow out of an existing law, it itself created it, and once again it has been the modernist jurists who prepared, provoked, and guided a new

legislation. The real task which confronts the contemporary jurists, beyond their immediate aim of adapting traditional Islamic law to modern conditions, is to evaluate modern social life and modern legal thought from and Islamic angle, to determine which elements in traditional Islamic doctrine represent, in their view, the essential Islamic standards. Although these changes have occurred in the Islamic world, but they have not affected the interest and importance of traditional Islamic law, which has existed for more than a thousand years. We can thank to the vitality, resourcefulness validity and flexibility of the Muslim system of law that it was possible to introduce substantial changes in it, while still preserving its spirit intact.

In a nut-shell, I conclude this study of the developments of changes in the Muslim personal law by dividing the legal systems of the Muslim world into three groups.

1. Those countries that still regard the Shariah as the fundamental law and the law of the land, and still apply it more or less in its entirety e.g., Saudi Arabia, Northern Region of Nigeria. Saudi Arabia has not received any system of foreign law and it has promulgated very little legislation under western inspiration.
2. Those that have abandoned the Sharia and substituted a wholly secular law.
3. Those that have effected some compromise between these two positions.

# PRECEDENTS FOR LAW REFORM IN ISLAMIC HISTORY: RELEVANCE FOR INDIA

Mr. Tahir Mahmood

*Delhi*

## I

The problem of reform in Muslim Personal Law in India has assumed a highly controversial nature. The opponents of reform regard the *Sharia* law as absolutely immutable, while its advocates reject their theory. The latter feel that since the *Sharia* law had been amended by the Muslim jurists themselves during the first few centuries following the emergence of Islam and many of its principles have been reformed, in the recent past, in several Muslim countries, there should be no objection to its reformation in India as well. The present paper is addressed to a study of this contention in some detail.

## II

The first part of the above contention in concerned with the juristic activities of the Caliphs and Imams in the early days of Islam. Pages of Islamic history reveal that changes were frequently introduced in the *Sharia* law by the ancient jurists themselves. Caliphs Omar and Ali had overruled some principles of law settled by their prdecessors. Imam Shaibani had set aside some of the verdicts of his master Imam Abu Hanifa; Ghazzali had deviated from certain principles of law laid down by Imam Shafei; Shatebi had dissented from some of

the opinions of Imam Malik; and so on. These are the facts of Islamic history which need some explanation.

The Prophet of Islam had not come with any *corpus juris*. Neither the Quran nor the *Sunna* had furnished an exhaustive cede of law. These *nusus* had provided only the fundamentals of the law. Formation of detailed legal rules was left to the Prophet during his life time. After his demise, the mission was taken over by the Caliphs who were the administrative-cume-cclesiastical heads of the Islamic State, and, at a later stage, by the jurists and interpreters of the revealed law. Through the media of their judgments and *fatwas*, they filled the scriptural skeleton of the law with flesh and blood.

The tool employed, for the purpose, by the interpreters of law was the exercise of reason the validity of which had been decreed by the Prophet himself. The exercise of reason assumed, in the hands of the jurists, the form of various sources of legislation. Some of these were:

(i) *Qiyas* (analogy)

(ii) *Istihsan* (Equity)

(iii) *Urf and ada* (Custom and usage), and

(iv) *Masaleh al-mursala* (Public Interest)

Muslim law, thus, underwent a long process of evolution. The fabric of law was woven and rewoven with the spindle of juristic interpretation or administration. During this period of development, Islamic law remained a 'law in the making'. In this period, if a later jurist or interpreter overruled the law settled by the predecessors, it constituted a step towards the development of law. Difference of opinion among the doctors of law in this period of Islamic legal history, in fact, formed part of the process of legal evolution. So, when Omar Faruq set aside a Siddiqui ruling abrogated Shaibovi a Hanafi precedent, Ghazzali overruled a Shafei principle, Tufi dissented from a Hanbali verdict, or Musa Kazim deviated from a Jafri ruling, each of these doctors of law aimed at the further

systematization of legal principles. All this juristic activity was based strictly on the interpretation of the mandatory laws revealed by the Quran or settled by the Prophet under Divine authority.

As a result of such juristic activity, several schools of law, based on the same sources but having conflicting doctrines in the matter of details, established their authority in several parts of the Muslim world. In the later phases of Islamic history, the principles of one or the other schools of law were accepted *in toto* by the various Islamic people.

## III

The second and the more important part of the contention, under review, of the advocates of changes in Muslim Personal Law in India relates to the reformation of Islamic law, in the recent past, in some Middle Eastern countries. The United Arab Republic, Sudan, Lebanon, Jordan, Syria, Tunisia, Morocco, Algeria, Iran and Iraq have reformed several principles of Islamic law as applicable in these countries. We will examine now if these developments in Muslim countries violated the sanctity of Islamic law.

*Sharia*, the code of Islamic law, is generally regarded as immutable. The fundamental principles of the *Sharia* are not open to reconsideration by man. In the legal theory of Islam, Allah is the only law- giver and there exists no other basis of the legal fabric than the divine will. While accepting this theory of immutability it should be clearly understood that what is immutable is actually the *grundnorm* of the *Sharia* and notany of its veried interpretations.

At least seven schools of Islamic law are presently prevailing in various parts of the world. These are the *Hanafi, Shafei, Maliki, Hanbali, Ithna 'Ashari, Ismaili and Zaidi.* Each of them has its own system of law. Many principles of law some of them quite significant differ from school to school. For

example, while a divorce pronounced during intoxication is binding under the Hanafi law, the same has no effect according to some other schools. Similarly, in the matters of polygamy, divorce, dissolution of marriage by court, etc. the schools of Islamic law differ from one another.

According to general practice, an individual should adhere to any one of the schools *in toto* and cannot be allowed the freedom to make his own choice of legal rules from the various schools. Nevertheless, all the schools have equal legal validity and sanctity. None of them enjoys any superiority over others, and jurists, legislators and judges may, in suitable cases, apply the principles of a school of Islamic law others than that which may be locally prevalent.

It is this flexible nature of Islamic legal system which formed the basis of the legislative reformation of law in some Muslim countries. In the U.A.R., Sudan, Lebanon, Jordan, Syria, Morocco, Algeria, Iraq and Iran, the legislature has replaced many provisions of the schools of Islamic law generally followed by their citizens by the corresponding principles of other schools. This was once made clear by the Egyptian Ambassador in India, Ahmed Hasan al-Feki. Speaking in New Delhi in January 1964, on the occasion of the 26th international Congress of Orientalists, he had said:

> "Countries of the Ottoman Empire, side-stepping all other jurisprudences, strictly adhered to the jurisprudence of Imam Abu Hanifa in regard to matters of detail. But independent Egypt from 1923 onwards, made successful reforms in the Hanafi Personal Law with a view to enlarging its scope and deriving benefits from other schools of jurisprudence also, apart from Hanifa's. Therefore, in the laws framed in the years 1929, 1931, 1943, 1949 and 1948, the appeal of the jurists to the rules of Imam Malik, Ibn Hanbal, Shafei, the Zahirites and the Sheite jurisprudence is well evident; and

this has been done on account of the fact that all these rules are forms of *ijtihad* permissible within the bounds and frameworks of Islam".

The codification of Islamic law in other Middle Eastern countries was also generally based on the same principles. It is, therefore, and erroneous belief that the Muslim countries have abandoned Islamic law in favour of any Western legal principles. It is one thing to adopt any extrinsic principles of law, another to avail of it the intrinsic values of the *Sharia* itself with a view to framing a uniform code of law. The latter process does not violate the sanctity of the *Sharia* in any sense.

## IV

The above discussion leads to two conclusions. First, Muslim countries have not amended the principles of Islamic law under any influence of the Western law. The twain object of legislative reformation of law in these countries have been to establish uniformity in the legal system and to enforce those principles found in the comprehensive Islamic jurisprudence which may be most suitable in the conditions prevailing in a particular country.

Secondly, the fundamental laws of Islam are sacrosanct. Its basic norms cannot be altered by any man-made law. But in the matter of details, where the schools of law have different rules, reformation is always possible, depending on the circumstances of particular countries. Specially, as long as any rule of law proposed to be adopted finds support in the opinion of any jurist of Islam, there is no violation of the sanctity of the *Sharia* if the same is incorporated into the prevailing law.

## V

The Sunni Muslims in India are presently governed by Muslim Personal Law, in family matters, in accordance with

the schools of Imam Abu Hanifa, or Imam Shafei. The Shei Muslims follow either the *Ithna Ashari* or the *Ismaili* school. In view of the changed social conditions of the country; the Indian Muslims adopt any rules of the schools of Islamic law not followed here. If they are advised to accept any legal rule, they may agree to do so if in embracing it they do not find themselves out of the comprehensive Islamic code.

The suggestion may be explained by a significant illustration. Some statutory and customary laws of India recognizing the right to pre-emption (*shurf'a*) on the basis of vicinage have recently been declared, by the Supreme Court of India, to be *ultra vires* of the Constitution. The *Hanafi* law of pre-emption also recognizes vicinage as one of the grounds for the right. The claim of a Muslim to the right of pre-emption on the basis of vicinage, if sought to be enforced through a court is likely to be rejected in the light of the said Supreme Court decision. It is only the Hanafi School which recognizes vicinage as ground for pre-emption. While the other Sunni schools of Islamic law do not include it among such grounds, the Sheite schools expressly reject it. The Supreme Court verdict represents a judicial suggestion that this particular rule of the *Hanafi* law does not conform to the present socio-economic conditions in the country. The Muslim community may, then accept the suggestion and agree to the replacement of the said Hanafi principle by the Shafei or the Shei law on the subject. In doing so, the community will not be violating any aspect of Islamic law. At the same time, it will not be isolating itself from the general legal trends in the country. Similarly since the Islamic law of polygamy and divorce are often misunderstood and therefore, misused, Muslim countries have now imposed legislative checks on the use of these remedial institutions of Islamic law. The new law are essentially within the bounds of Islamic law and do not conflict with any established principles thereof. Indian Muslims may also agree to adopt similar measures in respect of these very important aspects of family law.

## VI

The Muslims in India may not, however, accept the idea of a uniform civil law replacing their Personal Law. Such a law is, in fact, foreign to their religious beliefs and cultural traditions and also offends against our national ideals of a composite cultural heritage and 'unity amidst diversity'. Those Indians who wish to be governed by their distinct personal laws, whether Hindu or Muslim should not be forced to surrender to an individual in his discretion.

# DISCUSSION

Programme of the Seminar on Muslim Personal Law held at the Rampur Hamid Hall, A.M.U. Aligarh, on 14th and 15th of September 1968.

**First Session:** Saturday 14 September 1968, 11.30 A.M. to 1.30 P.M.

Chairman: Professor Hafeezur Rahman.

Papers: Mr. Fazlur Rahman Faridi, Secretary Islamic Research Circle, Aligarh. Maulana Minnatullah Rahmani.

**Secon Session:** Saturday 14 September 1968, 7.00 P.M. to 9.00 P.M.

Chairman: Maulana Mufti Ateequr Rahman

Papers: Maulana Mohammad Ishaq Sandelvi. Maulana Sadruddin Ishlahi.

**Third Session:** Sunday 15 September 1968 8.30 A.M. to 10.45 A.M.

Chairman: Maulana Saieed Ahmad Akbarabadi.

Papers: Maulana Syed Ahmad Qadri, Mr. Azeezushafi, Mr. Mustafa Ali Khan

**Fourth Session:** Sunday 15 September 1968, 11.00 A.M. to 1.30 P.M.

Chairman: Mr. Nooruddin Ahmad,

Mr. Zafar Ahmad Siddiqi, Mr. Tahir Mahmood,

Mr. Mohammad Ghaus,

Mr. Mohammad Fazlur Rahman.

**Fifth Session:** Sunday 15 September 1968, 3.30 P.M. to 5.30 P.M.

Chairman: Maulana Minnatullah Rahmani.

Papers: Maulan Syed Hamid Ali, Mr. Anwar Ali Khan Soze.

**Sixth Session:** Sunday 15 September 1968 7.00 P.M. to 9.45 P.M.

Chairman: Maulana Sadruddin Islahi, General Discussion.

# SUMMARY OF DISCUSSION

On The papers read at the Seminar on Muslim Personal Law.

**Second Session:** Saturday 14 September, Evening Papers by Maulana Mohammad Ishaque Sandelvi and Maulana Sadruddin Islahi.

**Mr. Rahman Ali Khan** (Reader, Faculty of Law, A.M.U. Aigarh) raised the question whether Islam recognized man made law even though they might conform to the Shariah. A similar problem is posed by the secular courts administering justice according to the *Shariah* law. Are they competent to do so? What the *Sharai* status of their decision?

**Mr. Khan** pointed out the vast sphere of law in which Shariah law have never been fully enforced, e.g. the criminal laws and the Commercial Law: or if enforced earlier, they were gradually brought within the scope of secular laws during the last hundred years or so. No strong protest was registered by the Muslims against these changes. Seen in this historical back ground the present agitation over this issue looked rather odd. A contradiction was also involved in asking the Parliament to keep its hands off Muslim Personal Laws and in having got *Shariah* law enacted by it.

Commenting on some of the above points, *Maulana Mohammad Ishaque Sandelvi* said that the *Shariah* had laid down the procedure for changing the details of the law as the circumstances changed. We have to find means to apply this procedure in India as far as it is possible to do so.

**Mr. Mohammad Fazlur Rahman** pointed out that the Muslims in India were not obliged to ensure the enforcement of

those parts of the *Shariah* whose implementation pre supposed the existence of Islamic State, such as the Criminal Law. It was, nevertheless, their duty to strive their best for the implementation of such parts of the *Shariah* as did not require political power for their enforcement. Such a part was the laws relating to Personal Affairs. That some parts of the *Shariah* were abrogated by an alien power provided no justification for giving up the *Shariah* laws which are still on the Statute Book, he told Mr. Kahn.

**Mr. Fazlur Rahman** pointed out that the constitutional rights enjoyed by the Muslims in India par took the nature of a mutual contract among the various communities in India. Our demand for retention of the *Shariah* laws on the Statute Book was justified by the religious and cultural rights enshrined in the Constitution of India. The problems created by the administration of *Shariah* laws by a secular judiciary could be handled through continuous review and constructive criticism by competent scholars with a view to removing any error in interpretation.

**Mr. Irfan Ahmad Khan** (Departement of Philosophy, A. M. U. Aligarh) suggested the institution of *Qazis* for adjudicating according to *Shariah* in religious affairs such as the Personal Law. Muslims should find ways of settling their disputes outside the court.

**Mr. Anwar Ali Khan Soze** wondered whether involving the constitution of India in favour of the demand for non-interference in Muslim Personal Laws was justified. Article 44 of the Constitution implied such interference. Free India was not committed to the British policy of non-interference. The religious and cultural rights guaranteed by the constitution were so qualified as not to stand in the way of reforms in Personal Laws.

**Maulana Mufti Ateequr Rahman Usmani** (Chairman) intervened to remark that the competence and desirability of the parliament in deciding issues relating to the religious affairs

of the Muslims should be closely examined. This issue was crucial for the debate.

**Professor Dr. S. Maqbool Ahmad** (Director, Centre of West Asian Studies, A. M. U. Aligarh) remarked that no Muslim would dispute the fact that Personal Laws formed part of the *Shariah*. The question of the Parliament tempering with the *Shariah* did not arise. The real issue was whether we ourselves were competent to modify the details of the law and frame new rules in the light of the *Shariah* to cover the newly arising situations. The community was thoroughly convinced of the need of some adjustment and modifications in the *Shariah*, he said.

Discussing the sources of Law in Islam as stated in the two learned papers presented, Professor Maqbool asked what was really meant by *Ijma*. Was it the consensus of the community at large or the consensus of the *Ulema?* That question required careful consideration by the students of Islamic Law. In his opinion *Ijma* was not confined to an agreement among the *Ulema*. It covered the entire Community. The issues being discussed in the Seminar should be taken to the whole of the Community. Professor said awareness of these issues should be created in all sections of the community and then issues like polygamy and divorce rules should be decided through a referendum.

**Maulana Saeed Ahmad Akbarabadi** reaffirmed the position taken by most of the participant in the debate that no external authority was competent to interfere with the Personal Laws of the Muslims. There was an urgent need, however of ourself adopting the same independent and practical attitude towards our Law which was adopted by the early Muslim jurists. For them Law was a living and growing entity capable of expansion, further elaboration and new interpretations. The important question for us to consider was whether the climate of opinion and the intellectual activity we observe in the

Second and Third centuries of Islam could be revived, and how to do that.

In this connection Maulana Akbarabadi emphasized the need of reinterpreting the basic juridical principles handed down by the doctors of Islamic Law. A number of fundamental issues were involved. Take for example the status of what is a permissible course of conduct (*mumbah*). One was free to adopt any one of the several such courses open to him. Was The society competent to prescribe one out of these several courses making it legally binding.

Commenting on the rationale of the Islamic legal provisions and the exegesis expounded by the early doctors of Law and Intellectual, the Maulana observed that these arguments were the product of a particular age and were mostly relevant to the situation prevalent in those days. They were not equally good for all times. One had therefore to fall back on the specific provisions of the *Shariah* and take into consideration the situation in his own times.

**Third Session :** Sunday, 15 September, Morning Papers by Maulana Syed Ahmad Qadri, Mr. Azeezushafi and Mr. Mustafa Ali Kahn.

**Dr. Mumtaz Ali Khan** (Department of Persioan, A. M. U. Aligarh) discussing some of the anomalies cited by Mr. Azeezushafi, pointed out that only moral regeneration and education could rid the society of the tendency to evade the law and deceive the Social Authority. Faithful compliance with the Law of God and sincere regard for the rights of the fellow members of society cannot be elicited by Law alone.

**Mr. Anwar Ali Kahn Soze** wondered why women themselves did not come forward to protest against anomalous rules of Law.

**Dr. Mohammad Moin Farooqi** (Reader in Zoology, A. M. U. Aligarh) differed from the views expressed by Mr. Mustafa Ali Khan that man's history proved that he was

polygamous by nature. This could be true of the pre-civilization period only. Modern history hardly supported such a contention.

**Mr. Syed Mahmood Husain** (Advocate, Delhi) strongly reacted to some of the views expounded by Mr. Azeezushafi. He dealt at some length with the alleged anomaly in excusing progeny of a predeceased son from inheriting their grandfather. The permission to dispose at will to the extent of a third of the estate could easily look after such extraordinary situation. Any tampering with the basic principles underlying the rules of inheritance would disturb the whole body of these rules. Why did the protagonists of change in the rule with a view to removing the above mentioned anomoly show a similar concern for the children of the other would be heirs who die before a share is due? The pseudo reformers had no answer to this question. Mr. Husain pleaded for complete faith in the Just and Benevolent God who had given us the Laws of Inheritance as stated in the Quran.

Regarding polygamy, Mr. Husain decried the apologetic attitude adopted by some writer. Reason and Nature supported the Islamic position in this regard.

**Foruth Session:** Sunday, 15 September, Forenoon Papers by Mr. Zafar Ahmad Siddiqi, Mr. Tahir Mahmood, Mr. Mohammad Ghause and Mr. Fazlur Rahman.

**Mr. Arif Husain Rizvi** (Research Scholar, Department of Economics A. M. U. Aligarh) urged the Ulema and the jurists to give serious thought to two issues: polygamy and share of the child of a pre-deceased son in the Grandfather's estate. The possibility of providing through a will could not be regarded a substitute of a legal share. A legal provision was necessary to alleviate the sufferings of those affected by this anomaly.

**Mr. Mustafa Ali Kahn** re-affirmed that blood relation and not need lay at the basis of allotments in the Islamic law of inheritance. He refuted Mr. Tahir Mahmood's contention that reforms in the Personal Laws effected in the Muslim countries

did not amount to 'changes' in the Law. Citing some provisions of the Family Law Ordinances (1961) of Pakistan he argued that they involved changes in contravention to the specific provisions of the Shariah.

**Mr. Shamsul Haq Alvi** (lecturer in Civil Engineering, A. M. U. Aligarh) pointed out that the love and affection the Grandfather naturally had towards his grandchildren made it difficult to imagine that he would fail to provide for them through a will.

**Sheikh Mana Ali** (Visiting Scholar from Al-Azher, Cairo) briefly stated the historical background of the reforms in Family Laws in Egypt. These reforms were necessitated by the changed circumstances. Legislators in that country owed complete allegiance to Shariah and the various measures of reform have been kept within the bounds of the *Sariah*. The great need of the times was fresh thinking lest we lag behind the onward marching caravan of mankind. We should continuously review the received body of Laws in the light of the changing circumstances, modifying and expanding them in the light of the Quran and Sunnah. On the new issues on which these sources of Law were silent, we have to exercise our own judgment.

**Mr. Tahir Mahmood** pointed out that the *Mutazili* school of Islamic Law held the same opinions which have been incorporated into Pakistan's Family Law Ordinances (1961). The contention of their being contrary to the Shariah was, therefore, not true.

**Maulana Saeed Ahmad Akbarabadi** maintained that the so called Muslim countries had undoubtedly affected a number of changes in the Family Laws in violation of specific provisions of the *Shariah*. Tunisia has abolished polygamy and Algeria has changed the *wakf* Laws. This, however, should not perturb us. The policies of these countries were not ideals to be emulated. We should not regard them as our intellectual

leaders. For us the Quran and Sunnah were the final authority and the only authority too.

Policies of the Muslim countries should be critically reviewed in the light of that authority. We hold no brief for these countries which adopted many un-Islamic practices.

Maulana Akbarabadi decried the frequent glib references to 'changed circumstances'. How and why did the circumstances change? Were not some of these changes a product of changes in our own attitudes, whims and whishes? Shall Islam become subservient to the changing moods of its half hearted adherents? Let us first change ourselves according to the standards and values Islam has set before us. Let us mould the circumstances in accordance with the Islamic way of life. Islam believes in the bold approach epitomized in the line:

(Fight the trend of the Times should they not agree with you)

And not in the cowardly philosophy:

(Conform to the trend of the Times should they not agree with you).

**Sex Session** : Sundy, 15 September , Evening[1]

**Mr. Anwar Ali Khan Soze** recalled Iqbal's views on *Ijma* as stated in his 'Reconstruction of Religious Thought in Islam'. Elected representatives of the people could exercise, in the legislatures of the Muslim countries, the prerogative of *Ijma* according to Iqbal. Mr. Soze suggested that these legislatures should comprise two houses, the upper house, comprising exclusively of the *ulema*. Should the two house disagree and a joint session fail to resolve the difference, the Supreme Court should act as the final arbiter.

Muslim communities living as minorities in other countries should have their own representative bodies whose

[1] Discussion on the papers by Maulana Syed Hamid Ali and Mr. Anwar Ali Khan Soze, presented in the Fifth Session, was held along with the General discussion in the Sixth Session.

decisions should be considered as the views of the community as a whole by the Governments of these countries. Mr. Soze stressed that the Government as such had no right to tamper with the Muslim Personal Law in the name of reform. Initiative for reform should come from the community itself in the manner suggested above.

**Mr. Ahmad Surti** (Reader in General Education, A. M. U. Aligarh) said that restraints put on polygamous marriages would not go against *Shariah* as the *maroof* in India today is monogamy. If slavery could be abolished, having become misfit in the changed circumstances, why not polygamy? Restraints further curtailing the limits of the permissible did not amount to a 'transgression of the limits set by Allah'. Such was the case with permission to take four wives.

Mr. Surti rejected the hypothesis that monogamy was responsible for loose sex morals in the West. There were several factors at work and one could not single out this particular factor as the main cause.

Mr. Surti reminded the participants in the Seminar that the present Mohammadan Law were enacted by the British and were not necessarily synonymous with the Shariah. One should not forget this while discussing the desirability and scope of changes in the existing laws. One might not conceive of any change in the Shariat and yet one might agree to several changes in the existing Muslim Personal Law in India

**Mr. Syed Ibne Ali** (a retired Police Officer) emphasized the essentially religious nature of the Muslim Personal Laws, a point strongly supported by Mr. Fatah Mohammad (Advocate, Aligarh.)

**Mr. S. Nasir Ali** (Reader in Political science, A. M. U. Aligarh) rejected the contention of some participants that any attempt on part of the Muslims to overhaul their Personal Laws, in the light of *Shariah* and according to changed circumstances will amount to an invitation to the Government

to interfere in religious affairs. Such an attempt was urgently needed. It would be better if it was not made under the false assumption that the Governmet of India was bent upon 'tampering' with our religious laws. It was quite obvious that our own suggestions relating to reform, resulting from Ijma or any process the Muslim Community should deem fit to adopt, could become law only through the Parliament. It was no good to shut one's eyes to the hard realities of the situation. The modifications we suggest should also take into consideration the realities of the Indian society of which we are a part. Parliament and the judiciary in India are very much a part of the realities of our situation. Abstraction from these realities in a discussion on the issues raised in this Seminar will amount to wishful thinking leading us to absurdities.

Speaking on the status of women in Islam, Mr. Nasir Ali said that West's false pretentions regarding complete equality of the two sexes compared poorly with the genuinely humane and just treatment of women in Islam. As regard the permission to take a second wife, those denigrating it forget that it could materialize only after the freely given consent of the would be second wife. If the woman herself, in certain circumstances, willingly chose to share a husband with another woman, how could it be regarded as an outrage to womanhood?

Mr. Nasir Ali expressed grave doubts as to the feasibility and utility of popular referendum to decide issues relating to reform in Personal laws, as suggested by some participants.

**Dr. Mohammad Nejatullah Siddiqi** (department of Economics, A. M. U. Aligarh) speaking on the process of formulating concrete proposal for reform in Personal Laws, observed that it involved active participation by the *Ulema*, the jurists, the social scientists, and the common man. Expertise in Shariah and modern jurisprudence as well as a firsthand knowledge of the prevalent social conditions was necessary for framing new laws conforming to the *Shariah* and answering the needs of the society. Such stupendous task could not be

accomplished in a day. The stalemate in which we find ourselves has resulted from centuries of moral degeneration and intellectual stagnation. It could be ended only gradually. We must brace ourselves for a long drawn effort and should not expect much from a few seminars of the type we are having. Our early History had the same lesson to teach. The corpus of *fiqh* which we are proud of was the end product of a similar moral and intellectual process. Let us have a number of Seminars, discuss the issue in the Press and on the Platform. True *Ijma* could come about only through full and frank discussion backed by the necessary scholarship and a will to live according to the *Shariah*. Hasty resorts to mechanical short cuts could hardly be fruitful.

**Mr. Abu Zaffar Hassan Ahmad** (Research Scholar, Department of Theology, A. M. U. Aligarh) emphasized the role of independent individual *ijtihad* as compared to the artificially created Ijma, as a means of reform in Muslim Personal Law. The formative period of Islamic *fiqh* was resplendent not with consensus but individual ijtihad which carried along informed public opinion by the sheer weight of its genuineness and the scholarship and piety at its back. The scope of *ijtihad* is very wide. Real significance attached to the objectives of the *Shariah*, details of the law were secondary and liable to be replaced by new details ensuring the objectives of the *Shariah* and in greater conformity with the changing circumstances.

**Professor Dr. S. Maqbool Ahmad** congratulated the sponsors of the Seminar which was the first of its kind in India. It needed being followed up by similar conferences and other measures.

Commending the process underlined by Dr. Nejatullah siddiqi he suggested that the Muslim members of Parliament be also associated with the deliberative process likely to result in proposal for reform. He proposed and All India Conference of *Ulema*, jurists and the Muslim Members of Parliament to

discuss reform in the *Shariah* Laws as a whole. Personal Laws being a part of the *Shariah* could not be discussed in isolation. The question of external interference in religious affairs related to *Shariah* laws outside the Personal Laws also. The whole issue of applying the *Shariah* in modern circumstances needed a fresh consideration.

Indian Muslims could not enact Laws for themselves. Only the Parliament can do so. The only possible procedure of reform was for the Muslims first to decide what Law they wanted and then to forward these proposals to the Parliament for enactment, through the good offices of the Muslim MPs. The Parliament should also stick to this procedure. Any enactment relating to the *Shariah* which by passed the considered opinion of the *Ulema,* Muslim jurists and the Muslim MPs must stand condemned as blatant interference in the religious affairs of the Muslims. The crucial task was to see that action according to this procedure materialized. In this context Dr. Maqbool Ahmad invited the Islamic Research Circle to work for convening the convention suggested by him, seeking cooperation of other Muslim institutions in this regard.

Mr. Irfan Ahmad Khan emphasized the need of a new fiqh which; while firmly rooted in the Quran and Sunnah, could also answer the need of the times. The juristic literature handed down by the early Doctors of Islamic Law was a most precious treasure indeed. But it would be unfortunate if we failed to move on and rest contented by eulogizing our past glory. Intellectually speaking a Muslim cannot be eternally bound to any authority other than the Quran and Sunnah.

**Maulana Syed Hamid Ali** pointed out that evolving a new *fiqh* and reforming as well as preserving Muslim Personal Law in India were two distinct tasks. The latter cannot and should not wait the consummation of the former, imperative though it was. It called for long drawn, all out efforts, while the preservation of Muslim Personal Law, with suitable reforms in the light of Quran and *Sunnah* were urgently needed.

The Maulana observed that the Muslim Personal Law as presently enforced cannot be preserved for long. Sooner or later they are bound to give way under internal and external pressures. Even the *Ulema* and the Muslims in generals are dissatisfied with many of its existing provisions. They feel the need of some modifications. Such modifications are also called for in order to alleviate human suffering. It is therefore imperative that the desired changes are introduced in an orderly and careful manner before an external authority imposed some ill considered 'reforms'.

Taking note of the anomalies resulting from the implementation of the existing laws and the sufferings resulting from non-observance of Islamic injunctions by the parties concerned the Maulana remarked that it was a separate issue. This Seminar should confine itself to discussing the substance of the Law and the desirability and scope of changes in that law. Anomalies, injustices and sufferings resulting from wrong interpretations, lukewarm implementation or non-observance of the *Shariah* were products of moral and intellectual degeneration and should be handled separately.

**Mr. Mohammad Fazlur Rahman** emphasized the need of moral regeneration along with legal reform, which are liable to fail in their purpose without the former.

**Mr.Anwar Ali Khan Soze** summing up the fruitful discussion that evening highlighted the need of collective *ijtihad* to meet the challenges of the modern Indian situation. A beginning could be made along the lines suggested by Dr. Nejatullah Siddiqi.

**Maulana Mohammad Taqi Amini** (Lecturer in Theology and *Nazim Diniyat,* A. M. U. Aligarh) rising on a point of clarification stated some of the reasons why the Majlis-e-Tahqiqat-e-Shariah, Nudvatul Ulema, Locknow, could not take up the issue of Muslim Personal Laws.

# PRESIDENTIAL ADDRESSES

# THE AIMS AND OBJECTS OF THE SEMINAR ON MUSLIM PERSONAL LAW

F.R. Faridi

*Secretary, Seminar on Muslim Personal Law*

The present seminar on Muslim Personal Law has been organized as an academic endeavour for understanding the true nature of Muslim Personal Law in India. As believers in the eternal source of human guidance, the Quaran and Sunnah, it is our duty to abide by whatever is given us from that source and try to live up to it in practical life. In our eyes no wisdom is keener and no authority superior to alter or choose and reject from the values enshrined therein. But a true and genuine adherence to these values involves dynamic understanding of their content and import. The pages of Islamic history are full of the account of a galaxy of thinkers who have devoted their life to fresher considerations and critical appraisals of the meaning and relevance of the teachings of Quran and Sunnah to their own times. Such an attempt has always been motivated by a sincere desire to live up to these teachings and not by any evasive approach to adjust them to the so called changes in social milieu.

We shall be following in the footsteps of these thinkers if we take up the task left by them. Muslim Personal Law in India deserves such an appraisal. The move to change Muslim Personal Law or worse, to scrap it altogether to prepare a uniform civil code for all Indian citizens has given an urgency to a concerted effort at its reassessment. The present seminar is an humble effort to initiate this process.

It is agreed that Quran and *Sunnah* do not change and further that Muslim have no authority to do so. But what needs elaboration and analysis is the relationship between the Quran and *Sunnah* and body of Law termed as Muslim Personal Law. How far the provisions of the existing law are based on these sources? How many of these provisions are merely the codification of Textual Commands in these sources (*Nass*)? To what extent these provisions are correct and genuine application of the principles laid down by Islam? And further, are some parts of these laws based only on inference namely *Ijtehad*? These are vital questions that must be faced and answered if we hope to convince ourselves of the authenticity of Muslim Personal Law and save it from falling into a rut.

It is a well known fact that Quran in particular and *Sunnah* in general, do not give us detailed instruction for social life. The four schools of jurisprudence provide an eloquent testimony to the above assertion. By far the largest part of '*fiqh*' comprises the deductions from and applications of the teachings of Quran and *Sunnah* to actual life. The recognition of two secondary sources of Islamic law, namely *Ijma* and *Qiyas* also corroborate it. It is precisely this absence of detailed instructions regarding social life that ensures the eternal relevance of Quran and *Sunnah* and gives Islam the twin qualities of stability and flexibility. Hence Islam has lived down to our time with unmitigated vitality despite currents and cross currents of history.

The modernists who libel Muslims as a community opposed to flexibility and change miss the real issue. It is not dynamism and change that is foreign to a true Muslim temperament. On the contrary Islam is a forward looking and progressive force. It does not scoff at change like other religions: rather it takes changes in its strides. But change has to be accommodated within the basic framework of its values, not the other way. Modernists speak of change but mean total destruction of whatever Islam stands for. It is change in this sense that no Muslim can and will be prepared to accept.

For the other communities law giving is an entirely secular activity. But not so with the Muslims. To them law giving is part and parcel of religion. In so far as Quran and *Sunnah* clearly state the course of action to be followed, there is no choice for a Muslim. But where it is silent, Muslims have the freedom to choose their own course of action. The choice has to be subject to certain conditions; it must be and application or an extension of the teachings of Quran an *Sunnah* to these situations. To do this an understanding of the true nature of Islamic values is a must. This is one of the reasons why Muslims are so touchy and sensitive when people talk of change. They fear lest the change may be an euphemism for destruction or that it may be brought by those who neither believe in Islamic values nor understand them.

Still other aspect of the problem that calls for deliberation is the claim that secularism rightly conceived involves uniformity. To us it seems a strange interpretation one that means steam rolling the variety that India is. Our country is an illustrious example of the world in miniature: its glory derives from the variety and difference that it sustains. It is this diversity that provides for the matchless vitality of Indian nationhood. Any conception of secularism that destroys this variety will lessen the glory that India is. Leaders of India's struggle for freedom recognized this multicolor cultural heritage. Uniformity is the hallmark of dullness. If secularism stands for this it will surely degenerate into a dull and stereotyped ideology. Secularism itself has been differently interpreted in the Indian context. It does not purport to be antireligious and anti-diversity. It ensures cultural and religious freedom. Hence the value of preserving the features that distinguish one community from the other. Our insistence to preserve Muslim personal law derives sustenance from this understanding of secularism and democracy.

Such are the issues connected with Muslim Personal Law. It will be presumptuous on our part to claim a comprehensive coverage of all the issues in this seminar or even to claim that

relevant questions will have been answered after the seminar closes. But if some of the deliberations of the seminar are helpful in highlighting the urgency of constructive thinking on this problem the purpose would have been served. Nor do the meager resources of Islamic Research Circle, Aligarh qualify it for such a stupendous task. In all our humility we only hope to initiate the process.

The sponsor of this Seminar, the Islamic Research Circle, is a non-political academic body devoted to research on Islam. Special attention is paid to the application of Islamic injunctions to the problems of the modern man and to reinterpretation of Islam's guiding injunctions and principles with a view to facilitate the process of reorganizing social, political and economic life according to the teachings of Islam. The Circle has been working for the last fifteen years. It has been publishing a quarterly journal 'Islamic Thought' from Aligarh. It will be recalled that some years back the Circle organized a Symposium on Islam and Fine Arts at Aligarh which in this University was warmly appreciated by all. We hope this Seminar will further strengthen our tradition of scholarly approach to and unimpassioned deliberation on the various problems that Islam and the Muslim face today, all over the world.

# PRESIDENTIAL ADDRESSES

*At the Seminar on Muslim Personal Law*

## 1. Professor Dr. Hafeezur Rahman, Dean Faculty of Law, A.M.U. Aligarh.

Commending the role of the Islamic Research Circle in sponsoring the Seminar, Professor Rahman urged upon the participants to utilize fully this opportunity of discussing the important issues involved. The Indian public is generally ill-informed on these issues. As a result all sorts of opinions are freely expressed in the Press and on the platform. It was high time the Islamic Law relating to family affairs were explained to the laymen and their relevance to modern life duly emphasized. The Government of India seems to have an open mind on the issue, and hence the energies spent at the Seminar shall not be wasted.

## 2. Maulan Mufti Ateequr Rahman Saheb, President Nudvatul-Musannifeen, Delhi

Reminding the *ulema* and jurists participating in the Seminar of their responsibilities, Mufti Saheb drew their attention to the basic change in the situation independence had brought about. It would have worked well in the British period to decry Government's intentions to amend Muslim Personal Laws as interference in our religion. Public opinion would have been on our side and against the foreign rulers. But now we are a free people managing our own affairs and making our own Laws. Agitational approach of the pre-Independence type is not likely to deliver the goods in the changed situation. We should

give serious thought to our strategy and plan it in a responsible manner. Our stand should be clearly formulated and fully explained so that we may carry enlightened public opinion with us. This is all the more necessary in view of the activities of certain pressure groups and political parties which are bent upon destroying the culture and religion of the Muslims. We have to isolate these groups and expose their real intentions.

Explaining the nature of *Ijtihad* and the need of applying it to the issues under discussion, Mufti Saheb said that in his own opinion the correct approach lay in following a middle path between orthodox conservatism and westernized modernism. Making a reference to what had happened in some Muslim countries; he said that there were lessons to be learnt from the experience of those countries.

### 3. Maulana Saeed Ahmad Akbarabadi

Emphasised the need of carefully examining the issues being discussed as they called for *Ijtihad* which was a most responsible task. It has been the failure to exercise proper *Ijtihad* that is responsible for many of the problems we are facing. There is however, little room for slavishly imitating the west as one's ideal and trying to adapt Islamic Laws to imported norms.

### 4. Mr. Nooruddin Ahmad, Bar-at-Law, Delhi

Expressing satisfaction on the progress of the Seminar Mr. Ahmad congratulated the Islamic Research Circle for having sponsored it.

Tracing the development of Law in society, he mentioned some of the disabilities from which Roman law had suffered. These disabilities were later on inherited by Law in the western countries. Not a few of these disabilities related to the status of the women and other weaker sections of the society. With the

advent of Islamic Law man got a new and vigorous source of progressive social reform. Unfortunately the Christian opposition to Islam, instead of confining itself to purely religious affairs, was directed to Islamic Laws too, thus depriving large sections of humanity from this new dynamism.

A section of westernized Muslims imitated the West, being ignorant both of their own heritage and the predicament of the Western society. The sooner this intellectual slavery ended the better. Islam is a dynamic system as much meant for the modern society as it was for the earlier periods of history. It has a guidance to offer in every walk of man's life. Through the institution of *Ijtihad* it keeps pace with the changing times. Being the last and the final Religion, it allows no changes in the specific Laws it offers. As a matter of fact such changes are not at all needed. It is entirely wrong to assert that every change in the circumstances called for a change in the Islamic Laws. The reason is not far to seek. Islam's specific Laws relate to those aspects of life which do not undergo any basic change with the advance of time.

Let the West emulate our example and adopt our laws which alone could ensure stability and harmony. The Western society is torn with strife. Chaotic conditions prevail in social life. Adultery is legalized and illegitimate children increase in numbers. Islam's realistic approach prohibits adultery and permits polygamy. This instance is typical of the middle of the road approach of Islam. Here in lies an example for all to follow. Our own country is in search of a uniform civil code. This dream can come true only when our people shed all prejudices and undertake an unbiased study of the Islamic laws. That Law alone can provide the basis of a uniform civil code in modern India.

Mr. Ahmed called upon the participants to have confidence in the potentialities of the Islamic Law and fulfill their duties regarding its study, explanation, propagation and practice. Such a positive approach can solve our problems. One

should not be worried because of the Article 44 of the Constitution or the declared intention of the ruling party. These were manmade things liable to change with the changing conditions. Let us try to change the conditions favourably by asserting ourselves and playing the vigorous and constructive role assigned to the Ummat-e-wasat (The middle people) in the Quran.

**5. Maulana Minnatullah Rahmani, Amir Shariat, Bihar.**

Characterised the issues being discussed by the Seminar as part of the vast challenges we were facing in the modern age. Our future depended on the way we faced these problems. Should we fail to provide reasonable solutions in the light of Quran and Sunnah, we shall be putting unbearable strains on the allegiance of new generations to Islam. The Maulana urged upon the Ulema to rise up to this challenge and come out with their considered views on the problems being posed at the Seminar.

**6. Maulana Sadruddin Islahi**

Expressing satisfaction on the discussion in the concluding session of the Seminar, Maulana Islahi urged upon the Ulema and scholars participating in the Seminar to continue working on the subject. The issues raised during the discussions in the various sessions of the Seminar required scholarly treatment. Specialised studies of issues like Polygamy, Divorce, and Laws of Inheritance were urgently needed.

Welcoming the suggestion of Professor S. Maqbool Ahmad for evolving a consensus of the Muslim community on the main issues involved, the Maulana urged upon those present to work ceaselessly in that direction. A number of seminars and symposia were needed to sort out the issues. As the Director of Islamic Research Circle the Maulana assured

continued efforts in that context. But in view of the vast dimensions of the task, cooperation from all directions was needed.

In the end he thanked the participants and the audience. He expressed his gratitude to the A. M. U. Students' Union for their generous permission for holding the Seminar in the Rampur Hamid Hall.

# ISLAMIC RESEARCH CIRCLE

"The aim of this organization shall be research in the light of Quran and Sunnah, with a view to bringing out the guidance of Islam relating to the various aspects of life in terms understandable to the modern mind."

(Clause II, the Constitution of the Islamic Research Circle)

**Director:** Maulana Sadruddin Islahi

**Asst. Director:** Dr. Mohammad Nejatullah Siddiqi

**Chief Editor Islamic Thought:** Mr. Fazlur Rahman Faridi

**Advisory Concil:**

1. Dr. Mohammad Abdul Haq Ansari
2. Mr. Fazlur RahmanFaridi
3. Dr. Mumtaz Ali Khan
4. Mr. Irfan Ahmad Kahn
5. Dr. Mohammad Nejatullah Siddiqi
6. Chief Editor, Islamic Thought (Ex-officio).

**Members of the Committee appointed by the Advisory Council to organize the Seminar on Muslim Personal Law:**

1. Dr. Mumtaz Ali Khan (Convener)
2. Mr. Mohammad Fazlur Rahman
3. Mr. Fazlur Rahman Faridi
4. Mr.Irfan Ahmad Khan
5. Mr. Iqbal A. Ansari
6. Dr. Ehsanullah Khan
7. Dr. Mohammad Neja..llah Siddiqi
8. Mr. Ahmad Surti.

# ISLAMIC THOUGHT

**A Quarterly Journal devoted to Islamic Research**

"The Islamic Research circle has been publishing this journal for the last seventeen years. It has mainly dealt with issues arising from application of Islamic principles in the modern society. Subjects related to the Social Sciences, Philosophy, and the Natural Sciences are studied in the light of the Quran and Sunnah. Solutions are sought for the problems the modern man faces in the light of the guidance that Islam has to offer. Detailed implication of Islamic injunctions are worked out with a view to assisting the contemporary efforts at the reorganization of social, political, and economic life along Islamic lines.

In the last few years 'Islamic Thought' has included papers by such eminent scholars as Syed Abul Ala Maudoodi, the martyr Syed Qotb, the late Dr. Mohammad Abdullah al-Araby (Egypt), Dr. Yunus Kahruddin (Indonesia), Maulana Sadruddin Islahi, the late Dr. Mohammad Rafiuddin (Pakistan), the late Professor Mohammad Umaruddin (Aligarh), Mr. H. M. Zerruq (Ceylone), Dr. Mohammad Abdul Haq (Visa Bharti, Shantineketan), Dr. Ehsanullah Khan (Chandigarh), Dr. Mohammad Moin Farooqi (Aligarh) and Mr. Mohammad Fazlur Rahman (Aligarh).

'Islamic Thought' enjoys a wide, though select, reader ship. Contributions from students of Islam are always welcome. Besides the main articles, it also welcomes critical comments on the articles published and 'letters to the Editor' airing specific views on the issues under discussion. Books

relevant to the purpose in view are reviewed by competent scholars. Annual subscription (four issues):
Rs. 8.00 for India, Pakistan & Ceylon.
Dollars 2.50 or £ 1, for other countries, sea Mail
Dollars 4.00 or £ 1, 10 shillings by Air Mail

Price of single copy Rs. Two. Extra Registration and or Air Mail charges to be paid by the subscriber. 25% commission to agents taking five copies or more. Some back numbers are also available at the rates mentioned above.

Address:
Manager
Islamic Thought
Gulshan Suhail, Badar Bagh
Aligarh, India.